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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,367)

(35,367)

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[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Parsons & Mills, filed July 20, 1929, omitted in printing.

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575. Law.

FLOY P. BALDWIN, Plaintiff,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation, Defendant

[fol. 2] [Caption omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA.

APPLICATION OF PLAINTIFF FOR LEAVE TO FILE AMENDED AND SUBSTITUTED PETITION—Filed November 6, 1928

Comes now the plaintiff and asks the Court for leave to file the Amended and Substituted Petition tendered herewith.

In support of this Application, plaintiff shows that said Amended and Substituted Petition makes some of the allegations of the original Petition more specific, but does not change the substantial nature of plaintiff's demands, and that copy of this Amended and Substituted Petition has been delivered to the Attorneys for defendant.

(Signed) Prince, Harris & Beery, Denton Dunn, Lehmann, Seevers & Herlbert, Fred W. Lehmann, Jr., Counsel, Attorneys for Plaintiff.

[fol. 3] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AMENDED AND SUBSTITUTED PETITION—Filed November 6, 1928

Now, on this 6th day of November, 1928, the Court, on application of plaintiff, grants leave to plaintiff to file the

Amended and substituted Petition tendered with said application.

Done at Des Moines, Iowa, this 6th day of November, 1928.

(Signed) Chas. A. Dewey, Judge Southern District of Iowa.

IN UNITED STATES DISTRICT COURT

AMENDED AND SUBSTITUTED PETITION—Filed November 6, 1928

1. Plaintiff for her amended petition in substitution for the original petition herein says that she is now and was at the time this suit was brought a citizen and resident of the State of Kansas, having removed thereto from the State of Missouri where she was a citizen and resident when her suit was brought which resulted in the judgment herein sued on, and that the defendant is and was at all said times mentioned a corporation organized and existing under and by virtue of the laws of the State of Iowa, and that the amount in controversy herein exceeds the sum of $3,000, exclusive of interest and costs.

2. That by the consideration of the District Court of the United States for the Western District of Missouri in the Western Division thereof at Kansas City, Missouri, at the November, 1926, term of said court on the 4th day of January, 1927, plaintiff recovered a judgment against defendant in the sum of Eight Thousand Two Hundred and Forty ($8,240.00) Dollars bearing interest from said day at the rate of six per cent per annum, with costs then taxed at $26.80, a transcript duly authenticated under the Act of Congress of which judgment is hereto attached and made a part hereof, as if fully herein set forth, and is marked Exhibit "A," and plaintiff further says that said judgment was duly given and made.

3. That as shown by said transcript the defendant duly entered its voluntary appearance in the action upon which said judgment was entered by appearing therein by at- [fol. 4] torney of its own motion and by written motion moving the court to dismiss said cause for lack of diligent

prosecution thereof by the plaintiff as alleged in defendant's said motion as set forth in said transcript, and

4. Also as shown by said transcript that defendant entered its appearance in said cause by filing therein its motion on January 26, 1925, to quash the service of alias summons upon it, for want of jurisdiction of the person of defendant, and by submitting its said motion to the court in said action upon the evidence offered by it and by the plaintiff thereon, and suffering said motion to be overruled by said court and final judgment entered in said cause without appeal or writ of error therefrom upon said court's finding that at the time said suit was begun and of the said last service of summons therein on the defendant that defendant was extensively transacting its regular business of an accident insurance association in the State of Missouri and in such manner and to such extent as to warrant the inference that it was present there, and that the O. C. Sheley served by the marshal of said court as agent of the defendant was at the time of such service a proper and legal agent of the defendant therefor under the law of the forum in Jackson County, Missouri, where such service was by said marshal's return had, and that said service was valid in law and fact and gave said court jurisdiction of the defendant to enter final judgment therein in said cause.

5. And plaintiff further says that said finding and judgment of the court on all the issues, as shown by said transcript was duly given and made and remains unappealed from and in full force and effect as a final determination of the rights of the parties, and that no payment has been made on said judgment.

6. That under the law of the forum of the court rendering said judgment so duly given and made, that is to say, the law of the State of Missouri now and at the time of the rendition of said judgment, as set forth in the decision of the Supreme Court of Missouri in the case of Hall vs. Wilder Manufacturing Company (to be officially reported in — Mo. —, now appearing in 293 S. W. 760), and the Missouri cases cited therein, a submission to a superior court in Missouri by a defendant of the question of such court's jurisdiction over such defendant is a submission to such court for a final determinati-n of such question, unless duly ap-

pealed from as allowed by law, and is not subject to collateral attack.

[fol. 5] Wherefore plaintiff prays judgment against defendant for the sum of Eight Thousand Two Hundred Forty ($8,240.00) Dollars with Six (6%) Per Cent interest per annum thereon from January 4, 1927, and said $26.80 costs and the costs of this action.

(Signed) Prince, Harris & Beery, of Kansas City, Mo.; Denton Dunn, Lehmann, Seevers & Herlbert, of Des Moines, Iowa, Attorneys for Plaintiff. F. W. Lehmann, Jr., 812 Valley Bank Bldg., Des Moines, Jr., of Counsel.

Duly sworn to by Denton Dunn. Jurat omitted in printing.

EXHIBIT "A" TO AMENDED AND SUBSTITUTED PETITION

Judgment Entry

Now upon this 4th day of January, 1927, this cause having been set upon the trial calendar of the court for this day, and due notice of such setting having been mailed by the clerk to the attorneys of record of the respective parties who have appeared as such for the plaintiff and the defendant respectively upon the hearing of motions heretofore filed herein, and said cause having been called by the court, and Prince, Harris and Beery and Denton Dunn, attorneys, having answered for the plaintiff, and no answer [fol. 6] having been made for the defendant, though called by the court, the plaintiff thereupon by her said attorneys made application to the court for the entering and making of a judgment by default, and it appearing from the record herein and the court finding that this suit was filed on June 9th, 1922, in the Circuit Court of Jackson County, Missouri, at Kansas City, and that the same was duly removed therefrom to this court on the application of the defendant on the ground that the plaintiff was a citizen of the State of Missouri, residing at Kansas City, Jackson County, Missouri, at the time this suit was begun, and the defendant a corporation organized and existing under the laws of the State of Iowa, and that this action is of a civil nature in-

volving a matter in dispute exceeding the sum of $3,000.00 exclusive of interest and costs, and it further so appearing that on November 15th, 1922, the defendant filed herein a transcript of the proceedings and removal from said State Court, and also, by Hagerman & Jost and Sullivan & Sullivan, its attorneys, its motion to quash the service of summons upon it as made in said State court and to dismiss said cause, reciting in said motion that it appeared specially for such purpose, and it so appearing that on October 22nd, 1923, this court sustained the prayer of said motion to quash the original service of summons herein and overruled its prayer to dismiss the cause, and it further so appearing that defendant thereafter before any alias summons had been issued against it herein, on June 17th, 1924, filed its motion, by its attorneys, Sebree, Jost and Sebree, to dismiss the cause on the ground that plaintiff had taken no further steps or action in the case since the quashal of service aforesaid and that on the state of the record defendant was entitled to a dismissal of this cause at the cost of the plaintiff, for which it prayed by said motion, reciting therein that defendant appeared thereby specifically and only for the purpose of said motion, and it further so appearing and the court finds that on November 18th, 1924, alias summons to the defendant herein was issued, and the United States marshal's return of service thereof upon the defendant to the April, 1925, term of this court filed herein on November 20th, 1924, and that on November 24th, 1924, after hearing arguments by counsel for both parties the court overruled defendant's motion to dismiss last aforesaid, and that on January 25th, 1925, defendant, by and through its attorneys, Messrs. Sebree, Jost and Sebree, of Kansas City, Missouri, and Sullivan and Sullivan, of Des Moines, Iowa, filed its motion, reciting therein that it appeared specially for no other purpose, to set aside the service of summons herein and quash the return of said sum-
[fol. 7] mons and hold the service of the same for naught and dismiss this cause for want of jurisdiction of the person in the State Court, from which this cause was removed, and in this court, for various reasons alleged in said motion, and it so further appearing, and the court finding, that thereafter said motion was argued and submitted to the court upon the briefs and affidavits filed and thereafter filed by the respective counsel for the parties, the plaintiff

contending that there had been legal service upon defendant and that in addition by its praying also for dismissal of the cause and especially by its separate motion therefor after quashal of the first service of summons and before the second service upon it, it had voluntarily submitted itself to the jurisdiction of the court, and it further appearing and the court finding that on January 26th, 1926, the court overruled said last motion of defendant and allowed it thirty days to further plead herein, as shown by the record and the memorandum opinion of the court filed upon said day, finding and holding upon the record, proof and affidavits filed herein by the parties that at the time this suit was begun and of the last service of summons herein the defendant was extensively doing its business of accident insurance in the State of Missouri, both by obligating every member by contract to use his influence in furthering the interest of the defendant association and in practice construing this to mean that its members should solicit other persons to become members, and to this end furnishing its members with application blanks of said association, and pursuing this course extensively in Missouri, where its members so solicited accident insurance business for it, and also by making adjustments in Missouri of claims on its accident insurance policies held by its members therein, using local physicians in having members examined, and even its home office physician coming into the State for such purpose, and that defendant was transacting its regular business of an accident insurance association in the State of Missouri at the time of the service so made upon it, and was so doing business within said State in such manner and to such extent as to warrant the inference that it was present there, although having no office or place of business therein, and not being authorized to do business therein by license from the Superintendent of Insurance of Missouri as provided by the laws thereof, and that the O. C. Sheley so served as agent of the defendant by the marshal of this court according to his return on file herein was and had been for fifteen or twenty years an examining physician employed by the defendant in Jackson County, Missouri, and [fol. 8] aiding and assisting in a manner in the settlement and adjustment of its losses in Missouri, and that he was under the law of the forum a proper and legal agent for service at the time thereof upon the defendant in Jackson

County, Missouri, where such service was by said return had, and that said service was valid in law and fact, and that in the premises defendant was in law bound to plead further herein within the time allowed by the court or suffer default herein, and it further appearing to the court that the defendant has failed to plead further herein within the time allowed by the court as aforesaid by its order of record of January 26th, 1926, or since said date, the court doth now find as aforesaid and that the defendant has failed to file its answer or other pleading within the time prescribed by law and the rules of practice and order of the court, although lawfully summoned and its motions to quash service and to dismiss have long since been overruled, and that an interlocutory judgment by default should be given against the defendant in favor of plaintiff herein.

Wherefore the Court, having jurisdiction of the cause and the parties, doth order and adjudge that the plaintiff have and recover of defendant by default nil dicit the damages the court shall assess under the plaintiff's petition and evidence that may be offered in support thereof, and thereupon the plaintiff having adduced evidence in proof of the allegations of her petition, the court finds that the same are true, and that the plaintiff is entitled to recover of the defendant as prayed by her, and the court further finds from the evidence offered under said petition that due proofs of loss under the defendant's Five Thousand ($5,000.00) Dollar accident insurance policy upon the life of the insured, sued upon and offered in evidence herein, were received by defendant at its home office on November 17th, 1922, from plaintiff as the duly appointed beneficiary of said policy, that the principal sum of said policy, Five Thousand ($5000.00) Dollars, was due and payable to plaintiff by defendant under said policy and the by-laws of defendant in evidence as a part of said policy, sixty days after said last date, or on January 17th, 1922, and that plaintiff is entitled to the legal rate of six per cent (6%) interest per annum on the amount of said policy from said date of January 17th, 1922, and the court further finds from the evidence that defendant has vexatiously failed and refused to pay plaintiff the amount so due her under said policy, by reason whereof, she is entitled under the laws of Missouri to recover herein from defendant the further sum of ten per cent damages on said sum of Five Thousand ($5,-

[fol. 9] 000.00) Dollars, or Five Hundred ($500.00) Dollars, in addition to said principal sum, and said interest thereon amounting to One Thousand Four Hundred and Ninety ($1,490.00) Dollars, and that in like manner, under Missouri law, the plaintiff is entitled to recover of the defendant a reasonable attorney's fee herein, which the court allows the plaintiff in the sum of One Thousand Two Hundred and Fifty ($1,250.00) Dollars under the evidence adduced herein, or a final judgment in all for the sum of Eight Thousand Two Hundred and Forty ($8,240.00) Dollars, with the costs of this action, now taxed at $26.80.

Wherefore, the court, being fully advised in the premises, doth order and adjudge that the plaintiff have and recover of the defendant herein the sum of Eight Thousand Two Hundred and Forty ($8,240.00) Dollars with interest thereon at the rate of six per cent (6%) per annum from this day and costs herein, and that the plaintiff have execution therefor according to law.

Certificates to foregoing paper omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED PETITION—Filed December 1, 1928

Comes now the defendant, and for answer to the petition of plaintiff states:

Par. 1. That it denies each and every allegation in plaintiff's petition, and exhibits thereto, contained, except only such as are hereinafter expressly admitted.

Par. 2. Defendant denies that the plaintiff has any valid judgment against the defendant, or that any valid or legal service of original notice was ever had or made upon the defendant in the State of Missouri, or any other State, or elsewhere, or that the plaintiff has now or ever had any right or cause of action against the defendant.

Par. 3. Further answering, the defendant states, that the Iowa State Traveling Mens Association is a mutual accident insurance society, organized and incorporated under the laws of the State of Iowa, with its principal and only

place of business at Des Moines, Iowa. That it has never been incorporated in or licensed to do business in the State of Missouri, and has never submitted itself to the laws of the State of Missouri, relating to or pertaining to foreign corporations, nor complied therewith by filing its articles of incorporation with the Secretary of State, or the Superintendent of Insurance or any officer, or at all. That it has never empowered the Secretary of State, or the Superintendent of Insurance of the State of Missouri, or any other [fol. 11] officer or person in the State of Missouri, to accept service for it in any action in said State or elsewhere. That it has never appointed, charged or commissioned any officer, agent, or other persons in the State of Missouri, or elsewhere to accept service for it in any action in said State. That it has never appointed or commissioned any officer, agent or other person, in the State of Missouri, upon whom service of process may be had against whom process may be served, that it has never carried on, done or conducted, any business in the State of Missouri at any time; that it is not now carrying on, doing or conducting any business in said State, or does it now have nor did it ever have, any office, agency, or place of business, officer, agent, representative, employee or property of any kind in said State.

Par. 4. This defendant generally and specifically, denies that it was ever served directly or indirectly, with any notice of the pendency of this suit, except as in this answer hereinafter set forth.

Par. 5. That especially O. C. Sheley, upon whom pretended service of process or original notice was made in said cause, and upon which pretended service and process this pretended judgment was entered in favor of the plaintiff and against the defendant, is not now or was he ever at any time an officer, agent or representative of the defendant association. That he does not now, or has he ever at any time solicited insurance for or on behalf of this defendant, or made any contracts of insurance, or collected or received any premiums for insurance, or adjusted or paid any loss or claims, for said defendant association, or in any manner aided or assisted in so doing; nor was the said O. C. Sheley at any time ever in charge of any business, office, agency or place of business, in the State of Missouri,

had or maintained by the defendant, either at the time of the service of said pretended notice, or at any time during the happening of the matters complained of in plaintiff's petition, or has he exercised any authority, agency, or right, or assumed to exercise any authority or rights on behalf of the defendant association; nor has this defendant by its officers, or by agents, or representatives had or maintained any office or agency, whatever in the State of Missouri, or at any other place than at Des Moines, Iowa.

Par. 6. That the Iowa State Traveling Mens Association is a purely mutual organization with its home office and principal and only place of business in the City of Des Moines, Iowa, and depends upon its growth and member- [fol. 12] ship upon the interest and good will of its members; that it has no paid agents, servants of employees to solicit members or application for membership; that it has not now and never had any officer, agent, servant or employee of any kind in the State of Missouri, or in any other state, except the home office at Des Moines, Iowa, and none at said home office except such persons as are actively engaged in carrying on the business of the Association, at its home office. That membership in the defendant Association can only be secured by a written application to the Association made by the member himself; that the same must be submitted to the Board of Directors at the home office, in Des Moines, Iowa, and approved by them, and a certificate of membership issued before any person becomes a member of the Association, and that all applications for membership are and must be submitted to the Board of Directors at the home office at Des Moines, Iowa, and that no certificate is ever issued except from the home office at Des Moines, Iowa. That it was never admitted to do business in the State of Missouri, and never had any office there, for the transaction of business. That no one of its officers or agents was in the State of Missouri or served in the alleged suit and have not been there since; that no summons or process was ever served at any time upon any officer, or agent of the defendant in said suit.

That it was provided in the By-laws of the defendant Association, at the time of the admission by Ralph R. Baldwin in the defendant Association, that a deposit of the certificate of membership in the mails at Des Moines, Iowa, shall

complete the contract between the member and the Association, and that the contract should be deemed to be an Iowa contract, and that all the rights under his certificate of membership should be construed according to the laws of the State of Iowa.

Par. 7. That the cause in which the plaintiff claims judgment was originally commenced in the Circuit Court of Jackson County, State of Missouri, and was duly removed on the application of the Iowa State Traveling Mens Association, the defendant herein, to the District Court of the United States for the Western Division of the Western Distrito of Missouri, and that the defendant filed its motion to quash the service and prayed for a dismissal. That thereafter on October 22nd, 1923 the defendant's motion to quash service coming on to be heard, the Court having duly considered the same, sustained said motion, but declined at that time to dismiss the cause. Subsequently, and on the [fol. 13] 17th day of June, 1924, the defendant, the Iowa State Traveling Mens Association filed therein, defendant's motion to dismiss, based upon the said quashing of service, and the failure to take further steps therein, a copy of which said motion is hereto attached, marked, Exhibit "A" and made a part hereof.

Par. 8. That thereafter, and on the 18th day of November, 1924, the plaintiff herein caused to be issued, a summons against this defendant, and caused the same to be served upon one O. C. Sheley in Independence, Missouri, being the said O. C. Sheley mentioned in Paragraph 5 herein. Subsequently on the 4th day of January, 1927, such proceedings were had in said cause as are set forth in Exhibit "A" attached to plaintiff's petition.

Par. 9. That by reason of the foregoing, the service of the pretended summons upon O. C. Sheley, the pretended judgment entered in the said District Court of the United States, in and for the Western Division of the Western District of Missouri, was of no validity whatever, because no Court of the State of Missouri, Federal or State, had jurisdiction of the person or Property of this defendant, and the said pretended judgment is therefore illegal and void, and of no force whatever.

Par. 10. This defendant further says, that to enforce the said pretended judgment, set out in plaintiff's petition,

would be to deprive this defendant of the due process of law, for that the said Court rendering the said pretended judgment had no jurisdiction; had no right to decide said question; that it never had jurisdiction of the defendant in this case, and that said pretended judgment is violative of the rights of the defendant to only be held under due process of law.

Wherefore the defendant asks that the petition of the plaintiff be dismissed.

(Signed) Parsons & Mills, Attorneys for Defendant.

EXHIBIT "A" TO ANSWER

Defendant's Motion to Dismiss

Now comes the defendant in the above entitled cause appearing especially and only for the purpose of this motion and respectfully shows to the court that this cause originated in the Circuit Court of Jackson County, Missouri, at [fol. 14] Kansas City, and was duly removed on the application of the defendant to this court; that thereafter such proceedings were had herein; that defendant filed its motion to quash service upon it and prayed for a dismissal.

Thereafter, on October 22, 1923, the defendant's motion to quash service coming on to be heard, the court having duly considered the same, sustained said motion, but declined at that time to dismiss the cause.

Defendant shows to the court that plaintiff has taken no further steps or action in the case and that on the state of the record defendant is entitled to and prays for a dismissal of this cause at the cost of the plaintiff.

Sebree, Jost and Sebree, Attorneys for Defendant,
Iowa State Traveling Men's Association.

Filed June 17, 1924.

IN UNITED STATES DISTRICT COURT

REPLY—Filed February 25, 1929

Comes now the plaintiff, and replying to the Answer of defendant, heretofore filed herein, denies each and every allegation therein contained.

Plaintiff, further replying, states that the matters and things pleaded by the defendant in its said Answer, with reference to the jurisdiction of the District Court of the United States of the Western Division, of the Western District of Missouri, were submitted to and decided by said Court, and the defendant herein is attempting, by said averments, to re-litigate the matters and things by said Court determined.

Plaintiff, further replying, states that the defendant is estopped from re-asserting and re-litigating the said questions of fact which have been duly adjudicated by the said United States District Court for the Western Division of the Western District of Missouri, which has been set forth in plaintiff's Petition filed.

(Signed) Prince, Harris & Beery, Denton Dunn, Lehmann, Seevers & Hurlburt, Attorneys for Plaintiff.

[fol. 15] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY, ETC.—Filed February 25, 1929

The parties hereto hereby stipulate and agree that the diversity of citizenship of the parties is admitted as alleged in the petition, and it is further agreed that a jury is hereby waived by the parties, and that the case shall be tried by the Court without a jury, and that the Court shall give its decision in writing, stating separately the facts found and the legal conclusion founded thereon, and the whole decision shall be a part of the record and have the effect of a special verdict.

(Signed) C. W. Prince, Denton Dunn, F. W. Lehman, Jr., Attorneys for Plaintiff. Parsons & Mills, Attorneys for Defendants.

In United States District Court, Southern District of Iowa, Central Division

No. 575. Law.

Floy P. Baldwin, Plaintiff,

vs.

Iowa State Traveling Mens Association of Des Moines, Iowa, a Corporation, Defendant

Judgment—Filed April 24, 1929

The above entitled cause having come on for hearing in open court, the parties stipulated in writing that the diversity of citizenship of the parties is admitted; that a jury is waived; that the case be tried by the Court without a jury, and that the Court shall give its decision in writing, stating separately the facts found and the legal conclusions found thereon, and that the whole decision shall be a part of the record and have the effect of a special verdict. And said cause having been duly tried and argued in open court, same is submitted, and the Court being advised, finds as follows:

The suit is brought to recover against the defendant upon a judgment in the sum of $8240 with interest and costs entered against the defendant in the District Court of the United States for the Western District of Missouri, in the Western Division thereof, on the 4th day of January, 1927. [fol. 16] The defendant answering in this Court claims that said United States District Court was without jurisdiction to enter the judgment against the defendant, and that by reason thereof such judgment is null and void.

The Facts

Upon the hearing in this Court it was established by the uncontradicted evidence that the original suit upon which a judgment was entered by default, was instituted on June 9, 1922, in the Circuit Court of Jackson County, Missouri at Kansas City, and that the same was duly removed therefrom to United States District Court for the Western District of Missouri on the application of the defendant and

on the ground that the plaintiff was a citizen of the State of Missouri at the time suit was begun and the defendant a corporation organized and existing under the laws of the State of Iowa, and that the matter in dispute exceeded the sum of $3000 exclusive of interest and costs.

That after said cause was transferred to said United States District Court, the defendant, on November 15, 1922, appearing specially in said court, filed a motion to quash the service of summons upon it as made in the state court and to dismiss said cause, reciting in said motion that it appeared specially for such purpose. And on October 22, 1923, that court sustained the motion to quash the original service of summons, but overruled the motion to dismiss the case.

Thereafter, the defendant, on June 17, 1924, again filed a motion in said United States Court for the Western District of Missouri, to dismiss the case on the ground that plaintiff had taken no further steps or action in the case since the former motion was sustained quashing the service, and in said motion it again recited that defendant appeared specially for that purpose and only for the purposes of said motion. This motion was by the Court, on November 24, 1924, overruled.

On November 18, 1924, another summons was issued out of said Court, and the same was served on one O. C. Sheley, in Independence, Mo., as being an agent of the defendant Company. And on January 26, 1925, the defendant again filed its motion, reciting therein that it appeared specially and for no other purpose, and asking that the service of summons therein be quashed and the cause dismissed for want of jurisdiction of the person of the defendant.

[fol. 17] Thereafter, this second motion to quash was argued and submitted to the said United States District Court for the Western District of Missouri, and submitted to the Court upon the briefs and affidavits filed in support and in resistance of said motion, and on January 26, 1926, the Court overruled said last motion of defendant. And at that time the Court entered an order permitting the defendant 30 days to further plead.

In overruling the last motion of the defendant to quash the summons, the Court by memorandum of opinion made an affirmative finding that the defendant company was in

fact transacting business in the State of Missouri, and by reason thereof was within the meaning of the law, a resident of said State of Missouri, and that O. C. Sheley, so served as an agent of the defendant, was, under the law, a proper and legal agent of the defendant company.

The defendant failed or refused to appear at the end of the 30 days allowed to further plead in said United States District Court for the Western District of Missouri, whereupon a default was requested by the plaintiff as against the defendant, and the Court proceeded to hear evidence, and entered the judgment in the sum of $8240 with interest and costs as against the defendant in said United States District Court for the Western District of Missouri.

Upon the trail of the case in this court, after plaintiff had introduced the judgment entry made and filed in the District Court of the United States for the Western District of Missouri, the defendant introduced uncontradicted evidence that said O. C. Sheley was not at the time the purported service of summons was had upon him, or at any other time, an agent or officer of the defendant company, and that the defendant company never transacted any business in the state of Missouri other than the issuance of policies of insurance to residents of said state. That said defendant company was never a citizen or resident of the state of Missouri, and does not now and never did have any office, agency or place of business or property of any kind in said state of Missouri.

The defendant also offered and produced evidence that O. C. Sheley is a physician and surgeon, who was on occasions employed by the defendant company to examine and report on the condition of policy holders who were making [fol. 18] claims under insurance policies issued by the defendant company, but was in no way or manner an agent of such company.

Further evidence was offered by the defendant company that all contracts of insurance and policies issued by it were so issued upon applications for such insurance made to it at its home office in Des Moines, Iowa, and that neither in Missouri, nor in any other state, did it ever employ agents to solicit insurance other than its own policy holders should upon their own volition and without pay solicit applications, which if approved by the home office, were issued by it at Des Moines, Iowa.

The plaintiff offered no evidence in this court to contradict this evidence introduced by the defendant company, and the same stands undisputed and undenied. The Court, therefore, must find under the evidence in this court that the defendant company was at no time a resident or citizen of the State of Missouri; never transacted any business therein, and never did business within the state or maintained an agency therein that would subject it to the jurisdiction of a federal court of Missouri.

The Court further finds that O. C. Sheley, upon whom a summons was attempted to be served, was not at that time, nor has he since been an agent or officer of the defendant company. And it follows that the attempted service of the summons upon a policy holder and occasional employe of the defendant, was without force and effect, and did not subject the company to the jurisdiction of the federal court of Missouri.

The plaintiff does not claim in this Court that the appearance of the defendant in the state court for the purpose of moving its transfer to the Federal Court was an appearance or conferred jurisdiction of the Federal Court upon the defendant, and it has been held that such appearance for this purpose does not confer jurisdiction. Clark vs. Wells, 203 U. S. 164.

On October 22, 1923, the United States District Court quashed the summons, so that from and after that time the case stood in the United States District Court for the Western District of Missouri as though no summons has been issued.

Neither does the plaintiff in this Court claim that the defendant by appearing specially by the motion to quash the summons thereafter issued and to dismiss the case for lack of the jurisdiction conferred jurisdiction on the Fed-
[fol. 19] eral Court. That such special appearance did not confer jurisdiction on such Federal Court has been decided by several cases. Armstrong vs. Langmuir, 6 Fed. (2) 369; Yanusqauchas vs. Mallory S. S. Co. 232 Fed. 132.

And the fact, if it be a fact, that a special appearance in Missouri confers jurisdiction, would not apply to a Federal Court even though sitting in Missouri. Mexican Cen. Ry. Co. vs. Pickney, 149 U. S. 194; Goldey vs. Morning News,

156 U. S. 518, 526; Davidson Marble Co. vs. Gibson, 213 U. S. 10, 19.

The plaintiff in this case bases it claim to the validity of the judgment in the said Court solely upon the claim that as the District Court of Missouri found adversely to the defendant on its motion to quash the summons served on O. C. Sheley, that this became res [a-judicata] on the question of the jurisdiction of the United States District Court for the Western District of Missouri to render the judgment sued on in this case, and that by reason of said judgment the defendant is estopped of record to challenge the validity of said service of notice on O. C. Sheley, and the Court's finding in its memorandum of decision in ruling on said motion to quash that the defendant was in fact a resident of the State of Missouri at the time summons was so served on it in that state.

Plaintiff's contention, or at least one of them, being that the defendant having appeared specially to quash such summons, and having filed affidavits in support thereof, that in as much as the Court had found adversely on such motion the defendant was bound thereby. In other words, it is the claim of the plaintiff, as I understand it, that while the defendant may appear specially in that Court for the purpose of filing and having a hearing on a motion to quash and dismiss, and is not bound thereby because of such special appearance, yet, if the Court rules against it that this becomes a decision res [judicata] which cannot be collaterally attacked.

The Law

The United States Supreme Court has directly held adversely to plaintiff's contention on this point. Under Federal practice the appearance to object specially does not bind the parties to submit to the jurisdiction even on the overruling of the objection. Hitchman Coal & Coke Co. vs. Mitchell, 245 U. S. 229, 234; Big Vein Coal Co. vs. Read, 229 U. S. 31, 38; Goldey vs. Morning News, supra; Harkness vs. Hyde, 98 U. S. 476, 479; So. Pac. Co. vs. Denton, 146 U. S. 202, 206.

[fol. 20] It may be admitted that judgments of the District Court of the United States are entitled to the same degree of faith and credit as judgments of the Courts of the states under similar circumstances, but they will be

given such effect and such effect only as would be accorded under similar circumstances to the judgments and decrees of state tribunals of equal authority. Bank vs. Farnum, 176 U. S. 640, 645.

But where there is a question of jurisdiction in the Federal Courts the question so arising must be decided by our Federal decisions and not by some decision of the Missouri Supreme Court. Munter vs. Weil Co., U. S. 276, 278; Davidson Marble Co. vs. Gibson, 213 U. S. 10, 19.

The Court has examined the several cases cited by the defendant and they practically all sustain the rule that each state has a right to determine what amounts to a general appearance in its Courts that will confer jurisdiction. Some of the Courts hold that a special appearance in their jurisdiction amounts to a general appearance, and a party entering a special appearance becomes bound as though appearing generally; while other Courts hold that where a special appearance is made and a ruling made either in its favor or adversely, and thereafter an appeal is had upon such ruling, that such appeal and recognition of the ruling of such Court amounts to a general appearance, and that in such case the Courts have jurisdiction. That is, the Courts recognize that where by the decisions of the highest Court of a state jurisdiction is conferred by appearance, that other states and the Federal Court will recognize such state law, and that if judgment is entered the same will not be subject to collateral attack.

That is good law, but is not controlling here. Even though the Missouri Supreme Court in the case of Hall vs. Wilder Mfg. Co., 293 S. W. 761, 762, holds that a special appearance when ruled upon adversely constitutes a general appearance and confers jurisdiction, the Federal Courts will not be bound thereby, as the decision on this question of jurisdiction rests in the Federal Court and under the authorities of the United States Supreme Court above designated, no matter what the State Courts may hold on this question, we are bound by the holdings of such United States Supreme Court that the overruling of a motion filed in the Federal Court where special appearance is had to attack the jurisdiction of the Court, does not confer jurisdiction on the Federal Court.

[fol. 21] This Court is unable to see wherein the Federal Court in Missouri ever acquired jurisdiction as against this

defendant. Special Appearance in the motion to dismiss and quash the summons was certainly not a general appearance to the merits of the case which the Federal Courts require.

The decision of the United States Court for the Western District of Missouri that the defendant was a resident of said district could not be binding or relied upon as res adjudicata, because it was only a ruling on a motion, and that motion expressly recited that appearance was made by the defendant for a special purpose. A ruling on a motion certainly could not be a trial on the merits of a jurisdictional question. In fact the only record the Court could make in ruling on this motion was either "overruled" or "sustained." And the fact that the District Court of Missouri overruled the special appearance and motion of the defendant, as decided by the Supreme Court cases above noted, did not confer jurisdiction.

Plaintiff, however, may still contend that the decisions above referred to by the Supreme Court of the United States are not decisive on the question of a collateral attack on a judgment. There is no doubt, however, of the general proposition that in a suit upon a judgment the jurisdiction of the Court rendering the judgment over the person of the defendant may be inquired into. Nat'l Exchange Bank vs. Wiley, 195 U. S. 257; Haddock vs. Haddock, 201 U. S. 562, 573.

If there is a total want of jurisdiction the proceedings are not merely voidable, but void, and may be rejected when collaterally drawn in question. York vs. Texas, 137 U. S. 15; Rose vs. Himely, 4 Cranch, 241; Elliott vs. Peirsol, 1 Pet. 328; Shriver vs. Lynn, 2 How. 43; Galpin vs. Page, 18 Wall. 350.

The defendant, therefore, had a right in this Court to attack the jurisdiction of the United States Court for Missouri which rendered the judgment sued upon as having been entered. And the evidence in this case being undisputed that the defendant at no time was a resident of the State of Missouri, and the evidence clearly so showing in this case, it must follow that the Missouri Court was without jurisdiction to enter the judgment and that the same was null and void.

The plaintiff places considerable reliance upon the fact that the judgment entry in the Missouri Court is entitled to

great weight as it expressly finds that the Court has juris-
[fol. 22] diction and contains about five type-written pages of findings and conclusions. It is true that a very strong presumption exists as to the validity of any action taken by a United States District Court, and every presumption prevails as to its validity. But, after all, questions of jurisdiction are mere presumptions and are always subject to collateral attack where the evidence clearly and conclusively shows that the Court was without jurisdiction.

The very fact that so much effort and detail were necessary to set out in the judgment entry casts some doubt upon the plaintiff's position as he felt it necessary to explain in such judgment entry his position at such great length and by such a devious route to procure the same.

The large judgment obtained is also illuminating. The plaintiff not only recovered $5,000, being the face of the insurance policy sued on, with six per cent interest from January 17, 1922, but also the sum of $500, being 10 per cent damages which the order recites is permitted under the laws of Missouri, and an additional sum of $1,250 for an attorney fee, which is also claimed under a Missouri law, in all aggregating $8,240 and interest.

These allowances and sums are so apparently illegal a question naturally arises whether or not the trial judge, if his attention was called thereto, did not feel that the judgment was entered for what it was worth, and that the worth thereof was probably negligible.

The Clerk is therefore directed to file the following:

Order

Plaintiff's petition is dismissed upon its merits with judgment against the plaintiff for costs.

To all of which plaintiff excepts.

Signed at Des Moines, Iowa, April 24, 1929.

(Signed) Chas. A. Dewey, Judge U. S. District Court.

In United States District Court

Order Extending Time to File Bill of Exceptions—Filed May 25, 1929

Now, on this day, upon her application, the Court doth grant leave to plaintiff herein to prepare, have signed and

[fol. 23] file her bill of exceptions, in this cause on or before ninety (90) days from April 24th, 1929, the date of entry of judgment by the Court herein.

Done at Des Moines, Iowa, this 24th day of May, 1929.

(Signed) Chas. A. Dewey, United States District Judge for the Southern District of Iowa.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 20, 1929

To the Honorable Charles A. Dewey, District Judge:

The above named plaintiff feeling aggrieved by the judgment rendered and entered in the above entitled cause on the 24th day of April, 1929, does hereby appeal from said judgment to the Circuit Court of Appeals for the 8th Circuit, for the reasons set forth in the assignment of errors filed herewith, and she prays that her appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, under the rule of such court in such cases made and provided, and your petitioner further prays that proper order relating to the required security to be required of her be made.

(Signed) F. W. Lehmann, Jr., Prince, Harris & Beery, Denton Dunn, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed July 20, 1929

The plaintiff, in connection with her petition for appeal in this action says that in the record, proceedings, and final judgment therein, manifest error has intervened, to the prejudice of appellant, to-wit:

1. That the court erred in not sustaining plaintiff's objection to the introduction of any evidence under the defendant's answer on the ground that said answer does not

[fol. 24] state facts sufficient to constitute a defense to the petition of the plaintiff.

2. That the court erred in finding for the defendant, and in not finding for the plaintiff, upon the pleadings in the cause, upon which the case was tried by the court.

3. That the court erred upon the facts found by the court in finding for the defendant, and in not finding for the plaintiff, upon the judgment against defendant sued on by her.

4. That the court erred in holding that the defendant was not estopped from questioning the judgment against it sued on herein by its having submitted by motion to quash service the question of the jurisdiction of the United States District Court for the Western District of Missouri over its person to said latter court and receiving after hearing a decision of said court upholding its jurisdiction over the person of said defendant, remaining unappealed from and not set aside, and resulting in said judgment sued on herein.

5. That the court erred in permitting the defendant to make a collateral attack upon the judgment sued on herein of the United States District Court for the Western District of Missouri, after it had appeared in said latter court in the suit resulting in said judgment specially to submit therein the question of the jurisdiction of said court over its person, and said court had upon hearing of said question overruled said jurisdictional objections so submitted, and thereafter entered a final judgment by default against the defendant now sued upon herein.

6. That the court erred in holding that the overruling, after hearing the evidence and argument of the parties thereon, of the defendant's motion to quash the service on it, by the United States District Court for the Western District of Missouri, was not res judicata of said court's jurisdiction over the person of defendant after resulting in the judgment against defendant which remaining unreversed and not set aside, was sued on herein, although defendant appeared specially only in said first suit to raise and submit to said court jurisdictional issue.

7. That the court erred in holding that the judgment sued on in this cause was subject to collateral attack therein by the defendant, and that the United States District Court for

the Southern District of Iowa could in this action, over the objection and exception of plaintiff, receive evidence and [fol. 25] substitute its findings thereon for those of the United States District Court for the Western District of Missouri upon the issue of the latter's jurisdiction of the person of the defendant in the suit resulting in said judgment, although it appears therein and herein that defendant had appeared in said former suit and specially submitted to that said court said issue of jurisdiction of its person therein and said court had overruled defendant's objections to such jurisdiction after hearing thereon inter partes, and had thereafter entered final judgment against defendant in said cause and in favor of plaintiff, which judgment having remained unreversed and not set aside, issued upon herein.

8. That the court erred in denying to the plaintiff her constitutional rights under the Constitution of the United States, and particularly under the Full Faith and Credit Section 1 of Article IV thereof, and Sec. 905, Revised Statutes of the United States (Sec. 687 Title 28, U. S. C. A.), enacted in pursuance and by authority of said Constitution, requiring the duly authenticated transcript of judgment sued on and offered in evidence herein to have such faith and credit given it in every court within the United States, as it had by law or usage in the court of the State from which it was taken, in that the court herein denied to plaintiff recovery herein upon said authenticated judgment sued on herein.

9. That the court erred in refusing to follow in this case the law or usage of the State of Missouri to the effect that a defendant who appears in a suit in a court, having jurisdiction of the subject matter of such suit, to question the court's jurisdiction over his person, and submits said question on evidence offered by it to said court, and allows such court's final judgment sustaining said jurisdiction to stand without reversal or setting aside, has had his day in court on said question of jurisdiction, and is estopped by such final judgment to question said jurisdiction in an action on said judgment in every court within the United States, as this court erroneously permitted defendant herein to do over plaintiff's objection and exception.

10. That the court erred in permitting the defendant over the objection and exception of plaintiff to adduce evidence seeking to show that it had never done any business in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, nor ever had any agent in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, when both the primary record and evidence herein showed that defendant had litigated all said [fol. 26] questions in the original suit in the Federal Court of the State of Missouri, and was estopped of record thereon by the overruling of its motion to quash service upon it by said latter court raising all said questions embodied in the final judgment of said United States District Court for the Western District of Missouri, standing unreversed and not set aside and sued upon herein.

11. That the court erred upon the primary record of this cause in not finding that plaintiff was entitled to recover herein and in finding that defendant was entitled to have said cause dismissed with prejudice upon the merits at the cost of plaintiff.

12. That the court erred upon the whole record in finding for the defendant and against the plaintiff as prayed by her.

13. That the court erred in admitting in evidence the affidavit of O. C. Sheley filed in the Federal Court in Kansas City, on April 28th, 1925, offered in evidence upon the trial of this cause by the defendant over the objection of plaintiff that the same was incompetent, immaterial and irrelevant to any issue in the case.

14. That the court erred in admitting in evidence the testimony of H. C. Rex, an officer of defendant that defendant had never done any business in Missouri, nor ever had any agent therein, over the objection and exception of plaintiff, that such evidence was an attempt to attack collaterally the judgment sued on and pleaded, and that such testimony was incompetent, irrelevant and immaterial, and an attempt to readjudicate issues already adjudicated by the judgment pleaded and sued upon.

15. That the court erred in not holding that the defendant was also estopped from questioning herein the jurisdic-

tion of the Missouri Federal Court to render the judgment sued on herein by reason of defendant's having filed in said court on June 17th, 1924, its motion as admitted by its answer herein, as an exhibit thereto, to dismiss said former suit for lack of diligent prosecution of same by plaintiff; and in not holding that the filing of said motion and submission of same to that court, constituted a general appearance by defendant in said cause.

16. That the court erred upon the record herein in not finding that plaintiff was entitled to recover judgment herein against the defendant for the sum of Eight Thousand Two Hundred Forty Dollars ($8,240.00) with six per cent [fol. 27] (6%) interest per annum thereon from January 4th, 1927, to the date of rendition of judgment herein, plus Twenty-six and 80/100 Dollars ($26.80) costs shown as costs taxed against the defendant, as shown in the authenticated transcript of judgment sued on, and for the costs herein.

Dated July 20th, 1929.

(Signed) F. W. Lehmann, Jr., Prince, Harris & Beery, Denton Dunn, Attorneys for Plaintiff-Appellant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed July 20, 1929

On motion of F. W. Lehmann, Jr., Esq., Counsel for plaintiff, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the 8th Circuit, from the judgment rendered herein on April 24, 1929, be and the same is hereby allowed, and citation ordered issued as provided by law, and that a certified transcript of the record, bill of exceptions, and exhibits, stipulations and all proceedings be transmitted to said Circuit Court of Appeals for the 8th Circuit as provided by law.

It is further ordered that the bond on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

(Signed) Chas. A. Dewey, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS—Filed July 20, 1929

The plaintiff in the above entitled case desiring to have a bill of exceptions settled for the purpose of appeal

Now, on motion of F. W. Lehmann, Jr., attorney for said plaintiff,

It Is Ordered: That the present term and the jurisdiction of the Court over and above-entitled cause, for the purpose of presenting and having settled a bill of exceptions, be and the same is hereby extended for a period of thirty days, from July 23, 1929, provided, however, that the pro-
[fol. 28] posed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided in the rules of this Court.

Dated at Des Moines, Iowa this 20th day of July, 1929.

(Signed) Chas. A. Dewey, District Judge.

IN UNITED STATES DISTRICT COURT

No. 575. Law

FLOY P. BALDWIN, Plaintiff,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation, Defendant

Bill of Exceptions—Filed July 20, 1929

CAPTION

Be it remembered that on the 25th day of February, 1929, at a stated term of said court begun and holding at Des Moines in and for the Southern District of Iowa, Central Division, before his Honor, Charles A. Dewey, District Judge, the issue joined in the above stated cause between

the said parties upon the amended and substituted petition of the plaintiff herein, the amended answer of the defendant thereto filed, and the plaintiff's reply filed, came on to be tried before the said judge without the intervention of a jury, the parties aforesaid having by their counsel duly waived a jury in writing signed and filed in said cause and providing that the court should make and file its findings of facts in said cause separately from its conclusion of law thereon; the plaintiff appearing by F. W. Lehmann, Jr., Esq., of Messrs. Lehmann, Seevers & Hurlburt, C. W. Prince, Esq. of Messrs. Prince, Harris and Beery, and Denton Dunn, her attorneys, and the defendant by Messrs. Parsons and Mills, its counsel, and the proceedings hereinafter set forth were had:

The trial of the case was so begun on February 25th, 1929, and in the course of the trial counsel for the plaintiff did take and allege sundry exceptions to the rulings of the court which said exceptions are hereinafter set forth.

[fol. 29] The case was opened to the court in behalf of the plaintiff, and she introduced certain documentary evidence only in her behalf, as in the reporter's transcript of proceedings hereinafter described as Exhibits, A, B, C and D, respectively, which plaintiff's exhibits are in words and figures as follows, to-wit:

* * * * * * *

MEMORANDUM AS TO EXHIBIT A

Exhibit A is the judgment in the case of Floy P. Baldwin vs. Iowa State Traveling Men's Association, No. 5562, in U. S. District Court, Western District of Missouri, and is omitted at this place in the printed record pursuant to stipulation at marginal page 98 of this printed record for the reason that a copy of such judgment heretofore appears in this printed record as Exhibit A to the Amended and Substituted Petition at marginal page 9 of this printed record.

PLAINTIFF'S EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Western Division of the Western District of Missouri, Monday, November 24, 1924

5562

FLOY P. BALDWIN, Plaintiff,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, Defendant

(Order Overruling Motion to Dismiss)

This day this cause coming on for hearing upon defendant's motion to dismiss this cause the parties appearing by their attorneys a hearing is had and the court after hearing the arguments of counsel and being duly advised doth overrule said motion.

PLAINTIFF'S EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Western District, Western Division Sitting at Kansas City, Jackson County, Missouri

No. 5562

FLOY P. BALDWIN, Plaintiff,

vs.

THE IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation, Defendant

Motion to Quash and Dismiss

Comes now the Iowa State Traveling Men's Association, the defendant in the above cause, by and through its attor- [fol. 30] neys Messrs. Sebree, Jost & Sebree, of Kansas City, Missouri, and Sullivan & Sullivan of Des Moines, Iowa, and appearing specially and for no other purpose than to present and submit this motion, moves the court to

set aside the service of summons herein and quash the return of said summons and hold the service of the same for naught, and dismiss plaintiff's cause for want of jurisdiction of the person of the defendant in the State Court from which this cause was removed, and in this court for the following reasons.

1. That the defendant is a foreign corporation incorporated under the laws of the State of Iowa; that it has never incorporated under the laws of the State of Missouri, nor qualified for the transaction of business in said state under the laws pertaining to foreign corporations or at all; that it has never carried on at any time, any business in the State of Missouri and has never had any property in said state.

2. That the defendant has not now and never has had an agent, officer or servant in the State of Missouri.

3. That the said O. C. Sheley upon whom service of summons was attempted to be made in this cause, was not at the time of said attempted service, nor at any time prior or subsequent [thereof,] an agent, servant, employee, representative or officer of the defendant association.

4. That the defendant association has never applied for, or secured a license to do business in the State of Missouri, and has not authorized the Insurance Superintendent in the State of Missouri, or any other officer or person in the State of Missouri to accept service for the defendant in the State of Missouri.

5. That said pretended service is not in accordance with the laws of the State of Missouri pertaining to service upon foreign corporations. The defendant in support of its motion to quash and dismiss attaches hereto and makes a part of this motion, the affidavits of W. E. Tone, H. E. Rex, W. H. Smith and T. B. Cookerly.

Wherefore defendant prays that said summons be quashed and that said cause be dismissed for want of jurisdiction.

—— ——, of Kansas City, Missouri. Sullivan and Sullivan, of Des Moines, Iowa, Attorneys for Defendants.

[fol. 31] PLAINTIFF'S EXHIBIT D

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR the Western District of Missouri, Tuesday, January 26, 1926

5562

FLOY P. BALDWIN, Plaintiff,

vs.

THE IOWA STATE TRAVELING MEN'S ASSOCIATION, Defendant

Now on this day the Court files its memorandum opinion on defendant's motion to quash service, denying said motion and allowing the defendant thirty days to further plead herein. And it is accordingly so ordered by the court.

Thereupon plaintiff rested, and defendant thereupon on its part offered evidence under its answer over the objections of plaintiff, which was overruled by the court and exceptions taken at the time to such rulings, whereupon defendant introduced its documentary evidence referred to as Exhibits 1, 2, 3, 4, 5, & 5-1 in said reporter's transcript hereinafter set forth, and also certain oral testimony, all in the manner and form, with the objections of plaintiff, court rulings, and exceptions of plaintiff as in said reporter's transcript hereinafter set forth.

Said defendant's Exhibits 1, 2, 3, 4, 5 & 5-1 so referred to are in words and figures as follows, to-wit:

* * * * * * *

MEMORANDUM AS TO DEFENDANT'S EXHIBIT 1

Defendant's Exhibit 1 is the Motion of Defendant to dismiss in the case of Floy P. Baldwin vs. Iowa State Traveling Men's Association, No. 5562, in U. S. District Court, Western District of Missouri, and is omitted at this place in the printed record pursuant to stipulation at marginal page 98 of this printed record for the reason that a copy of such exhibit heretofore appears in this printed record as Exhibit A to the Answer at marginal page 22 of this printed record.

[fol. 32] DEFENDANT'S EXHIBIT "2"

"Alias Summons"

UNITED STATES OF AMERICA, set:

UNITED STATES DISTRICT COURT, WESTERN DIVISION, WESTERN DISTRICT OF MISSOURI

The President of the United States of America to the Marshal of the United States for the Western District of Missouri, Greeting:

You are hereby commanded to summon the Iowa State Traveling Men's Association, of Des Moines, Iowa, a corporation, to be and appear before the Honorable District Court of the United States in [—] for the Western Division of the Western District of Missouri, on the first day of the next term thereof, to be begun and holden at Kansas City, in said District, on the 4th Monday, the 27th day of April next, then and there to answer to complaint of Floy P. Baldwin, a citizen of the State of Missouri, as set forth in the petition filed in office of the Clerk of said Court, on the 15th day of November, A. D. one thousand nine hundred and twenty two. Hereof fail not, and have you then and there this writ.

Witness the Honorable Arba S. Van Valkenburgh, Judge of the United States District Court for the Western District of Missouri, the 7th day of November A. D. nineteen hundred and twenty-four. Issued at office in Kansas City, and said District, under the seal of said District Court, the last day and year last aforesaid.

Edwin R. Durham, Clerk, by A. Vinick, Deputy.
(Seal.)

Civil Docket No. 7229, Vol. 10, Page 81. No. 5562. United States District Court, Western Division of the Western District of Missouri. Floy P. Baldwin vs. Iowa State Traveling Men's Association Alias Summons Returnable to April Term, 1925, Returned into court and filed this — day of ——, 192-. Filed Nov. 18, 24, Edwin R. Durham, Clerk. By A. Vinick, Deputy.

[fol. 33] United States Marshal's Return

WESTERN DIVISION OF THE
WESTERN DISTRICT OF MISSOURI, ss:

I do hereby certify that I served the within writ by delivering a true copy thereof to Dr. O. C. Sheley.

All done in said Division and District this 15th day of Nov. 1924.

I. K. Parshall, United States Marshal, by Nathan Becker, Deputy Marshal.

Marshal's fees:

2.00 Service, 1.
.20 Street car fare, — miles travel.

2.20

DEFENDANT'S EXHIBIT "3"

"Alias Summons"

D. C. Form No. 45

UNITED STATES OF AMERICA, sct:

UNITED STATES DISTRICT COURT, WESTERN DIVISION, WESTERN DISTRICT OF MISSOURI

The President of the United States of America to the Marshal of the United States for the Western District of Missouri, Greeting:

You are hereby commanded to summon the Iowa State Traveling Men's Association, of Des Moines, Iowa, a corporation, to be and appear before the Honorable District Court of the United States, in and for the Western Division of the Western District of Missouri, on the first day of the next term thereof, to be begun and holden at Kansas City, in said District, on the 4th Monday, the 27th day of April next, then and there to answer to complaint of Floy P. Baldwin, a citizen of the State of Missouri, as set forth in the petition filed in office of the Clerk of said Court, on the 15th day of November, A. D. one thousand nine hundred and twenty-two.

Hereof fail not, and have you then and there this writ. [fol. 34] Witness the Honorable Arba S. Van Valkenburgh, Judge of the United States District [Judge] for the

Western District of Missouri, this 18th day of November A. D. nineteen hundred and twenty-four. Issued at office in Kansas City in said District, under the seal of said District Court, the day and year last aforesaid.

Edwin R. Durham, Clerk, by A. Vinick, Deputy Clerk. (Seal.)

Civil Docket No. 7229, Vol. 10, page 81. No. 5562, United States District Court Western Division of the Western District of Missouri. Floy P. Baldwin vs. Iowa State Traveling Men's Association Alias Summons Returnable to April Term, 1925. Returned into court and filed this 20th day of November, 1924. Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy.

UNITED STATES OF AMERICA,
WESTERN DIVISION OF THE WESTERN
DISTRICT OF MISSOURI, ss:

I, Edwin R. Durham, Clerk of the District Court of the United States in and for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a true copy of the Writ of Summons issued in the cause therein named, as fully as the same remains on file in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at office in Kansas City in said District, this 18th day of November, A. D. 1924.

Edwin R. Durham, Clerk of Said Court, by A. Vinick, Deputy Clerk. (Seal.)

Marshal's Return

WESTERN DIVISION OF THE
WESTERN DISTRICT OF MISSOURI, sct:

I hereby certify that in the County of Jackson in the City of Independence, State of Missouri on the 20th day of November, 1924, I executed the within writ of summons on the within named defendant, Iowa State Traveling Men's Association, by delivering a duly certified copy of this writ and copy of Petition to its agent O. C. Sheley, [fol. 35] in Independence, Missouri, and I further certify that at the time of said service, the within named defend-

ant had no office or place of business in Jackson County, Missouri. In witness whereof, I have hereunto set my hand and affixed my official seal this 20th day of November, 1924.

I. K. Parshall, United States Marshal, by Nathan Becker, Deputy.

Marshal's fees:

2.00 Service, 1.
.20 Street car fare, — miles travel.

$2.20

DEFENDANT'S EXHIBIT "4"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 5562

FLOY P. BALDWIN, Plaintiff,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, Defendant

Affidavit of O. C. Sheley

STATE OF MISSOURI,
County of Jackson, ss:

I, O. C. Sheley, of lawful age, being first duly sworn upon oath say: That I am a resident of Independence, Jackson County, Missouri, and have resided in said City, County and State for the last 35 years continuously; that I am duly and regularly licensed and practicing physician and surgeon, practicing at Independence, Missouri.

I further state that for a period of about 15 or 20 years last past, I have represented the Iowa State Traveling Men's Association in the matter of examining persons who have made claims for indemnity against said Association. My best judgment is that during said period, I have, at the direction of said Association, so examined on an aver-

age of three or four persons a year who hold membership in said Association. The following is the manner in which I handle these matters for said Association:

After a member makes a claim for indemnity, I receive a letter or Notice from said Association, giving me the name of the claimant and his address, together with instructions to communicate with said claimant and to make a physical examination of him to the end of ascertaining [fol. 36] the extent of his injuries and also to make an oral examination of claimant concerning the circumstances surrounding his injury. After claimant is thus fully examined, I report my findings to the said Association, using a chart and form which said Association furnishes for me for the purpose. The chart enables me to portray in a clear and convenient way the location and character of the physical injuries of claimant. My report is thereupon mailed to the office of said Association, in Des Moines, Iowa.

I do not know of said Association having a business office in the State of Missouri, nor do I know of its having a representative who sells insurance nor who manages an office or place of business for it at any location in the State of Missouri. One of the persons referred me for Medical examination by the Association was Abe Cohn of Independence, Missouri.

Further deponent saith not.

O. C. Sheley, M. D., Affiant.

Subscribed and sworn to before me this 18th day of April, 1925. S. I. Workman, Notary Public Within and for Jackson County, Missouri. My commission expires Dec. 23rd, 1926. (Seal.)

(Filed April 28, 1925.)

DEFENDANT'S EXHIBIT 5

UNITED STATES OF AMERICA, sct:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a true copy of the De-

fendant's Motion to Dismiss; Alias Summons issued Nov. 7, 1924; with return of Marshal; Alias Summons issued Nov. 18, 1924, with return of Marshal; Affidavit of Floy P. Baldwin; Affidavit of O. C. Sheley; Affidavit of Abe Cohn; Additional Affidavit of Floy P. Baldwin; Judgment Entry, in the cause therein named, as fully as the same appears in my office.

[fol. 37] Witness my hand as Clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 10th day of December, A. D. 1928.

(Signed) Edwin R. Durham, Clerk. (Seal.)

EXHIBIT 5-1

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF MISSOURI, *ss:*

I, Merrill E. Otis, Judge of the District Court of the United States for the Western District of Missouri, do hereby certify that Edwin R. Durham, whose name is subscribed to the preceding exemplification, is the Clerk of the said District Court, duly appointed and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to the said exemplification is the seal of the said District Court, and that the attestation thereof is in due form of law.

Dated December 10, 1928.

(Signed) Merrill E. Otis, United States District Judge.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF MISSOURI, ss:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the Honorable Merrill E. Otis whose name is subscribed to the preceding Certificate is a Judge of the District Court of the United States for the Western District of Missouri, duly appointed and sworn, and that the signature of said Judge to said Certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office in Kansas City, in said District, this 10th day of December, 1928.

(Signed) Edwin R. Durham, Clerk U. S. District Court. (Seal.)

Said reporter's transcript of the offerings of documentary evidence by the parties, and of the oral evidence of the defendant, and of the proceedings before the Court on said February 25, 1929, contains all the evidence offered in the cause, and objections of plaintiff to the defendant's offerings of evidence, the Court's rulings thereon, and plain-
[fol. 38] tiff's exception thereto at the time taken, and said reporter's said transcript is in words and figures, as follows:

"Evidence on Behalf of Plaintiff

The plaintiff offers in evidence the authenticated copy of the judgment sued on herein, marked Exhibit A, and attached to the amended and substituted petition herein.

The plaintiff offers in evidence the record entry in the District Court of the United States for the Western Division of the Western District of Missouri in Cause No. 5562, Floy P. Baldwin vs. The Iowa State Traveling Men's Association, the order of the Court of November 24, 1924, marked Exhibit B overruling defendant's special motion to dismiss.

The plaintiff further offers in evidence the motion to quash and dismiss filed by the defendant in said case in said Court on January 26, 1925, marked Exhibit C.

The plaintiff further offers in evidence the order of said Court overruling said last motion to quash and dismiss on January 26, 1926 and marked Exhibit D.

All of said exhibits being duly authenticated under the Act of Congress by the Judge and Clerk of said Court.

Plaintiff rests.

Evidence on Behalf of Defendant

Defendant offers in evidence Exhibit 1, being the defendant's motion to dismiss filed June 17, 1924.

Plaintiff objects to the introduction of any evidence under the answer, on the ground that it does not state facts sufficient to constitute a defense to the petition of the plaintiff, also on the ground that it is irrelevant.

The Court: What is the matter with it? Don't they allege that this is void for want of jurisdiction?

Mr. Parsons: I thought we did. If we didn't, of course we will ask leave to amend.

The Court: Objection overruled.

Mr. Dunn: Your Honor might withhold his ruling until opportunity for argument is given. We wish to make the same objection to other offers of proof.

The Court: Having started in on the evidence, of course any evidence is admissible that supports the claims they [fol. 39] set out in their pleadings. Whether or not it constitutes a defense would be a matter for decision after the evidence is in.

Mr. Dunn: We just want the record to show that we object to it on the grounds stated, and on the further ground that the evidence offered is incompetent, irrelevant, immaterial for the reason that the evidence offered attempts to make a collateral attack upon the valid judgment sued upon.

The Court: Objection overruled.

Mr. Dunn: Plaintiff excepts.

The defendant offers in evidence Exhibit 2, which is the original summons issued by the Federal Court in Missouri, bearing date of the 7th day of November, 1924.

The plaintiff makes the same objection to all of the evidence offered by the defendant, and it may as well be understood that it is the same objection on the ground that the answer does not constitute a defense—does not contain facts constituting a defense or ground of defense, and that the evidence offered is incompetent, irrelevant and immaterial to any issue in the case, and it will be understood that there will be the same ruling and the same exception, or does Your Honor want to rule separately on those things? (Mr. Dunn speaking.)

The Court: You run your own chances. I am going to quit trying to help try this case now.

Mr. Dunn: We will then save an exception each time.

The Court: The objection is overruled.

Mr. Dunn: Plaintiff excepts.

Defendant offers in evidence the summons issued from the Federal Court for the Western Division of the Western District of Missouri, dated November 18, 1924, and marked Exhibit 3.

Mr. Dunn: Same objections as last stated.
The Court: Admitted.
Mr. Dunn: Exception.

Defendant offers in evidence Exhibit 4, being the affidavit of O. C. Sheeley filed in the Federal Court case at Kansas City in question here, on the 28th day of April, 1925.

[fol. 40] Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Plaintiff excepts.
Mr. Parsons: This is our affidavit that was filed in support of the motion to quash the two summons to—No, I am mistaken, it is their affidavit, plaintiff's affidavit.
Mr. Dunn: Plaintiffs make same objections.
The Court: I thought we were trying this law suit up here.
Mr. Parsons: We are attacking this on the ground that that Court there had no jurisdiction to hold us on that service.
The Court: You have a right to show any of the proceedings you had down there.
Mr. Parsons: That is all I am doing. These exhibits all being properly certified under the law.
The Court: That doesn't make them evidence. Admitted.
Plaintiff excepts.

Mr. Parsons: We offer in evidence Exhibit 5 and 5-1 being certified by the Clerk and Judge at Kansas City.
Mr. Dunn: Same objections.
The Court: Admitted.
Mr. Dunn: Exception.

H. E. Rex, being first duly sworn, examined by Mr. Mills, testified as follows:

Q. What is your name, please?
A. H. E. Rex.

Plaintiff objects to the evidence of this witness offered, for the same reasons, that this is an attempt to retry in this Court the issue tried and determined in the Court at Kansas City, as shown by the judgment sued upon.

The Court: Objection overruled.
Mr. Dunn: Exception.

Q. What is your official position with the Iowa State Traveling Men's Association?

[fol. 41] A. Secretary-Treasurer.

Q. You are the executive officer, are you?

A. Yes sir.

Q. How long have you been secretary-treasurer?

A. Twelve years.

Q. What sort of a company is your company?

A. Mutual assessment association.

Q. A mutual benefit assessment association?

A. Yes sir.

Q. To insure against what?

A. Accidents.

Q. Where is your place of business?

A. Fleming Building, Des Moines, Iowa.

Q. Have you any other place of business?

A. We have not.

Q. Do you own any property in the State of Missouri?

A. No sir.

Q. When I say "you" I refer of course to your company?

A. Yes, I so understood.

Q. Is the company licensed to transact business in Missouri?

Mr. Dunn: Plaintiff objects to that question for the reason that an attempt is being made to collaterally attack the judgment at Kansas City, the judgment that is plead in this case. And further reason the testimony here is incompetent, irrelevant and immaterial, and an attempt to re-adjudicate issues that were adjudicated at Kansas City in the judgment pleaded.

The Court: Objection overruled.
Mr. Dunn: Exception.

A. No sir.

Q. Did the company ever make application to transact its business in the State of Missouri?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. No sir.

Q. Has the company ever sought to do business, to get permission to do business of the insurance department of any other state?

Mr. Dunn: Same objection.
The Court: Overruled.
[fol. 42] Mr. Dunn: Exception.

A. No sir.

Q. Has the company ever consented that service might be made upon it in Missouri?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. No sir.

Mr. Dunn: Plaintiff moves to strike out the answer as the conclusion of the witness.
The Court: Overruled.
Mr. Dunn: Exception.

A. No sir.

Mr. Dunn: Move to strike out the answer as the conclusion of the witness.
The Court: Too late. Overruled.
Mr. Dunn: Exception.

Q. How are your applications for insurance received? Thru what channels?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. Through our members.

Q. Do they come by express or freight or what?

A. They come by mail entirely.

Q. When an application is sent in by mail it is received here at the Des Moines office, is it?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. It is, yes sir.

Q. What then is done with the application?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

[fol. 43] Q. It is placed before the Board of Directors and they act upon it. Accept or reject.

Q. After the proposition, the application is acted upon what is then done?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. A certificate is made out for membership and mailed to him through the mails.

Q. I will ask you whether or not the receipt of the application, its acceptance by the Board of Directors and the issuance and mailing of the certificate closes your contract?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. It does, yes, sir.

Q. Where was the—where are the assessments on these policies made payable? Where are they payable?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr. Dunn: Exception.

A. At our office.
Q. Where?
A. In the Fleming Building in Des Moines, Iowa.
Q. Are they payable anywhere else?

Mr. Dunn: Same objection.
The Court: Overruled.
Mr Dunn: Exception.

A. No, sir.

Q. When a claim is made for indemnity under the policy where is it made?

Mr. Dunn: Same objection.

A. At our office in the Fleming Building, Des Moines, Iowa.

Q. Who passes upon the claims presented for indemnity under these policies?

Same objection.

The Court: Overruled.

[fol. 44] Mr. Dunn: Exception.

A. The Board of Directors.

Q. Here in Des Moines?

A. Yes, in Des Moines.

Q. The payment is made in what manner and from where?

Mr. Dunn: Same objection.

The Court: Overruled.

Mr. Dunn: Exception.

Q. I mean cash, check or what?

A. It is made by check from our office.

Mr. Dunn: May it be understood that the objection is overruled and our exception saved without making the objection and taking the exception each time?

The Court: It is all right with me, as far as I am concerned, I don't know whether it is a safe practice or not.

Mr. Mills: We will consent to it.

Q. Are any claims allowed except by the Board of Directors?

A. No, sir.

Q. How is your membership secured, how do you get members?

A. By soliciting through the mails.

Q. Are you assisted in any way by your present members?

A. When we ask them for co-operation and send them a blank.

Q. Do they get anything for doing that? Are they paid for that?

A. No, sir.

Q. Is the business transactions with your Missouri membership transacted in exactly the same manner as your business with your Iowa membership?

A. It is.

Q. No difference?

A. No, sir.

Q. When you receive a notice of a loss, that is, somebody is injured or somebody killed, you—you don't have any health insurance, do you?

A. No, sir.

Q. Just death by accident or injury by accident?

A. Yes.

Q. When you hear of that, what do you do with reference to finding out how badly a man is hurt, or whether he is in fact hurt or not?

A. We usually pick out some physician in a town and ask them to wait upon that claimant and find out just how and how much, or to what extent he is injured, and make a report to us.

Q. That is, you want to ascertain whether he is temporarily or permanently injured?

[fol. 45] A. Yes, or what length of time he will be laid up.

Q. What compensation do you pay the doctor?

A. Just what he would charge for making any kind of a call.

Q. Is each transaction with the doctor independent of any other transaction?

A. Yes.

Q. I mean by that, are you obliged to call him the next time anything happens?

A. No, sir.

Q. Do you, as a matter of fact, in the City of Kansas City, refer to different doctors at different times to go and examine claimants?

A. Yes.

Q. Has the doctor any power to settle with the claimants?

Mr. Dunn: Same objection and the further objection it is calling for a conclusion of the witness.

The Court: Overruled.

Mr. Dunn: Exception.

A. No.

Q. Has he any other contractual relation with you aside from making a professional, individual call, for which he is paid?

A. No, sir.

Q. That has always been the custom of the company, has it not?

A. It has.

Q. This Doctor, Dr. O. C. Sheley, upon whom both these services were made, did you employ him from time to time in isolated cases?

A. Yes, sir.

Q. Do you remember any other doctor down there whom you employed in isolated cases?

A. Several. On- Dr. Bohan, I remember.

Q. And others?

A. Yes.

Q. Did you ever give the doctor any instructions except simply to make the call?

A. No.

Q. Simply to make a call?

A. Yes, and make an honest report to us, is all.

Q. He is not asked to make any recommendations with reference to the matter, is he?

A. No.

Q. Simply go and see the claimant and tell you as a professional man the extent of the injury, whether permanent or otherwise how long it is apt to continue. Sign his name and return it to you?

A. Yes, sir.

Q. Do you maintain any agency or representatives in any state to solicit insurance?

A. We do not.

Q. Did you ever do that?

A. No, sir.

[fol. 46] Q. Did you ever have any arrangement with any one to make contracts of insurance for you?

A. No, sir.

Q. Or collect premiums for you?

A. No, sir.

Q. Or pay losses for you?

A. No, sir.

Q. Or to adjust losses?

A. No, sir.

Witness excused.

Defendant rests.

Plaintiff rests.

Evidence closed.

Certificate of Reporter

"I, Nell D. Needham, Certified Shorthand Reporter, do hereby certify that the foregoing and attached pages, 1 to 14, inclusive, contain a full, true and complete transcript of my shorthand notes taken on the trial of the cause entitled Floy P. Baldwin vs. The Iowa State Traveling Men's Association, No. 575-Law, tried before Hon. Charles A. Dewey, U. S. District Judge, at Des Moines, Iowa, and reported by me in shorthand.

Signed at Grinnell, Iowa, July 9, 1929.

Nell D. Needham, Reporter."

Memorandum re Opinion and Judgment

After hearing all the evidence and argument of counsel on said February 25, 1929, the court took the cause under advisement upon briefs of counsel thereafter submitted, and upon April 24th, 1929, the said court filed its findings of fact and rulings of law thereon upon the issue so submitted to the court, and its order of dismissal of plaintiff's petition upon its merits, and then and there allowed plaintiff an exception to its said ruling in words and figures as follows, to-wit:

* * * * * * *

The opinion and judgment of the District Court appeared in the transcript of record at this place and is omitted from the printed record pursuant to stipulation at marginal page 98 of this printed record for the reason that such opinion and judgment heretofore appears in this printed record at marginal page 25 of the printed record.

[fol. 47] Approval of Bill of Exceptions by District Judge

Thereafter and within the said judgment term and the time allowed by said court, the plaintiff duly tendered this, its bill of exceptions herein, which having been seen and examined by the court and counsel, is by the court allowed and approved and signed and sealed by the Hon. Charles A.

Dewey, the judge of said Court before whom said proceedings were had and the same is ordered by said court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge of said Court before whom said proceedings were had this 23rd day of July, 1929.

(Sgd.) Chas. A. Dewey, United States District Judge. (Seal.)

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL FOR THE DEFENDANT

The foregoing Bill of Exceptions, together with the exhibits therein set out and thereto attached contain all the testimony and evidence and rulings made by the court on the trial of this cause necessary and material to the determination of this appeal.

Dated at Des Moines, Iowa, this 20th day of July, 1929.

(Sgd.) Parsons & Mills, Attorneys for Defendant.

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE

Settled, allowed, signed and sealed and a certification hereby made that the foregoing Bill of Exceptions contains all of the testimony given and the rulings of the court, together with exhibits therein set out and thereto attached, at the trial of this cause.

Dated at Des Moines, Iowa, this 23rd day of July 1929.

(Sgd.) Chas. A. Dewey, Judge of the United States District Court, Southern District of Iowa, Central Division.

[fol. 48] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed August 1, 1929

To Mr. N. F. Reed, clerk of above court:

Please certify to the Circuit Court of Appeals of the Eighth Circuit, a transcript of the record in the above case, setting forth the following:

1. Application of Plaintiff to file amended and substituted Petition.

2. Order of Court granting leave to file same Nov. 6, 1928.

3. Amended and substituted Petition (filed Nov. 6, 1928) with authenticated transcript of judgment Exhibit "A."

4. Answer to amended Petition, and Exhibit attached.

5. The Reply of Plaintiff.

6. Stipulation of parties admitting diversity of citizenship, waiving jury and asking special findings of fact, etc.

7. Finding of facts, and of law, and order of Court.

8. Judgment entry of April 24th, 1929.

9. Order of May 24th, 1929, fixing ninety (90) days from April 24th, 1929 to plaintiff to file her Bill of Exceptions.

10. Petition for Appeal and to fix amount of Bond.

11. Assignments of errors on appeal.

12. Order allowing appeal, and fixing amount of Bond.

13. Bond filed by plaintiff and Court's approval thereof.

14. Citation and acknowledgment of Service by defendant.

15. Bill of Exceptions (including Exhibits) and approval thereof, and order for and filing of same.

Dated July 31st, 1929.

(Sgd.) Prince, Harris & Beery, Denton Dunn, Lehmann, Hulbert & Hossfeld, Fred W. Lehmann, Jr., of Counsel, Attorneys for Plaintiff-Appellant.

[fol. 49] [Eye] service of copy of above Præcipe is hereby acknowledged this 1st day of August, 1929, and we agree that the same will constitute a complete record for the Appeal of the above cause taken by plaintiff.

(Sgd.) Parsons & Mills, Attorneys for Defendant-Appellee.

Bond on appeal for $500.00, approved and filed July 20, 1929, omitted in printing.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 8620

FLOY P. BALDWIN, Appellant,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation, Appellee

STIPULATION UNDER RULE 23 FOR OMISSION OF DUPLICATIONS IN PRINTED RECORD—Filed Sept. 18, 1929

It is hereby stipulated by the parties under Rule 23 of this Court that the Clerk thereof in printing the Record herein shall omit the transcript's duplications of documents in the bill of exceptions appearing also in the primary record, and incorporate them in the printed bill of exceptions by reference in the manner following:

1. Plaintiff's Exhibit "A," and authentication thereof, appearing in the bill of exceptions, which shall be there referred to as shown in the Record as Exhibit "A" attached to the Amended and substituted Petition at pp. —, and by such reference to be the same as if again fully set forth in the printed bill of exceptions.

2. Defendant's Exhibit 1, appearing in the bill of exceptions, which shall be there referred to as attached as an exhibit to its Answer to Amended Petition and shown in the Record at p. —, and by such reference to be the same as if again fully set forth in the printed bill of exceptions.

3. The signed Memorandum, Order and Judgment of the trial court, with allowance to plaintiff of exception thereto, appearing in the bill of exceptions at pages 80 to 91 of the transcript, which shall be shown in the printed bill of exceptions by reference to the setting forth of the same in full in the primary record (pp. 25 to 34 of transcript), and pp. — of the printed Record, and by such reference to be the same as if fully set forth in the printed bill of exceptions.

C. W. Prince, Denton Dunn, Attorneys for Appellant. Parsons & Mills, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 52] Appearances of counsel omitted in printing.

[fol. 53] Minute entry of argument and submission December 10, 1929, omitted in printing.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MARCH TERM, A. D. 1930

No. 8707

FLOY P. BALDWIN, Appellant,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation, Appellee

Appeal from the District Court of the United States for the Southern District of Iowa

Mr. Denton Dunn (Mr. C. W. Prince, Mr. James N. Berry, Mr. Clyde J. Linde and Mr. F. W. Lehmann, Jr., were with him on the brief) for appellant.

Mr. J. M. Parsons (Mr. Earl C. Mills was with him on the brief) for appellee.

Before Stone and Booth, Circuit Judges

OPINION—Filed Mar. 29, 1930

STONE, Circuit Judge, delivered the opinion of the court.

Appellant filed a suit on a judgment in the District Court for the Southern District of Iowa. The defense to this suit was lack of jurisdiction over the person in the court wherein the judgment was entered. After full hearing, the court sustained this defense and dismissed the suit. From such judgment of dismissal, this appeal is brought.

The original suit was brought in a state court in Missouri and, afterwards, removed to the United States District [fol. 55] Court for the Western District of Missouri. Appellee specially appeared with a motion to quash and dismiss for lack of service. The court sustained the motion to

quash but denied dismissal. Some months thereafter, appellee specially appeared with a motion setting forth that no further steps had been taken to obtain service and moved to dismiss the case for lack of service. Before this motion was passed upon, an alias summons was served on Dr. O. C. Sheley, of Independence, Missouri, as being an agent of appellee and, shortly thereafter, the above motion to dismiss was denied. Thereafter, appellee again appeared specially praying that this last service be quashed and the cause dismissed for want of jurisdiction of the person. Affidavits were introduced on both sides of the motion and, thereafter, the court overruled the motion, sustaining the service. Appellee appeared no further and, subsequently, proof was made and judgment entered.

The first contention is that this judgment cannot be collaterally attacked under the full faith and credit clause of the Constitution. This position is not well taken under National Exchange Bank v. Wiley, 195 U. S. 257, and Haddock v. Haddock, 201 U. S. 562, 573. It is a matter of no consequence that such service would have been good under the decisions of the State of Missouri, which hold that the overruling of an attack upon the jurisdiction of the person, even though under special appearance, gives jurisdiction. Such is not the rule in the federal courts and they do not follow the state courts in that regard. Of course, if the judgment had been recovered in a state court of Missouri, the situation might be different (Bank of Jasper v. First National Bank, 258 U. S. 112, 117), but here the service and the recovery were in a United States court.

Appellant contends that the filing of the motion to dismiss after the first service had been quashed, and upon the ground that no further service had been made, constituted a general appearance because it amounted to a motion to dismiss for failure to prosecute. The effect and purpose of the motion was to secure a dismissal for failure to prosecute but that failure relied upon related solely to service. It has been decided by the Supreme Court that a motion to quash service and dismiss, where made upon special appearance for that purpose, is a special attack upon the jurisdiction (see above citations). If a motion to dismiss in such connection is not a general appearance, we do not [fol. 56] see why the motion to dismiss here solely upon the ground of lack of service, where made on special appear-

ance, should be regarded differently. Good practice demands otherwise. If this were not so, a suit might be filed where there was no chance of service and there would be no protection therefrom, although such suit might be pending for years and might injuriously affect the credit and standing of a defendant. It is always within the power of the court to sustain or deny the motion, as justice may demand, and, thus, protect the rights of both parties without a sacrifice of either, while to construe such a motion into a general appearance, would deprive the defendant of the right to be relieved from the burden and ill effect of pending suits where there was no opportunity to or, possibly, no effort made to secure service. Also, see Miller v. Minerals Separation Ltd., 275 Fed. 380, 383 (Calif.).

The final contention is that the service upon Dr. Sheley was sufficient. The solution of such question ordinarily would depend upon matters of fact as to whether the appellee was doing business in the State of Missouri, at the time of such service, and whether Dr. Sheley was the kind of an agent upon whom a valid service could be made. However, the facts concerning each of these questions appear without dispute in the record, each of these questions becomes here a question of law. The facts as shown by the record are that the appellee had but one place of business which was at Des Moines, Iowa; that it had no agents who solicited business, but carried on such solicitation entirely by correspondence from its office and, occasionally, its members would be asked to secure policies which they would do or not, as they saw fit, and without pay. All losses were adjusted and determined at the office in Des Moines and settlements made by checks mailed therefrom. When a claim under a policy was received by the office, the procedure was to have some nearby physician make a physical examination of the claimant and procure his statement as to the cause and nature of the accident upon which the claim was founded. These were forwarded by the physician to the office and he was paid for the particular service. No discretion of any character nor any disposition of the claim was in such physician. He was merely the medium to procure information. The physicians were not employed upon any salaries and there was no obligation or contract be- [fol. 57] tween appellee and such physicians. The employment was entirely as to each separate service. Under the

above facts, it is clear that appellee was not doing business in the State of Missouri at the time of the service, nor was Dr. Sheley the character of agent upon whom service could be made. There are a great number of decisions to this effect, such as Minn. Commercial Men's Association v. Benn, 261 U. S. 140; Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602; St. Clair v. Cox, 106 U. S. 350. Among later cases in which there is extended discussion and citation of United States and federal cases are Rausch v. The Commercial Travelers Mutual Accident Association of America (decided by this court, January 30, 1930); Frink Co. v. Erikson, 20 Fed. (2d) 707 (C. C. A. 1); Compagnie Du Port, etc. v. Mead Morrison Mfg. Co., 19 Fed. (2d) 163 (Me.); Brown v. T. & P. Ry. Co., 18 Fed. (2d) 677 (La.) and Chatters v. L. & N. R. R. Co., 17 Fed. (2d) 305 (La.).

Appellant contends that, where the question of jurisdiction has been raised and determined in the court wherein the judgment, upon which suit is brought, was entered, there can be no examination of that matter in any other court. This contention is not well founded (St. Clair v. Cox, 106 U. S. 350, 359 and Compagnie Du Port, etc. v. Mead Morrison Mfg. Co., 19 Fed. (2d) 163, at page 165).

The judgment should be and is affirmed.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 8707

FLOY P. BALDWIN, Appellant,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, a Corporation

Appeal from the District Court of the United States for the Southern District of Iowa

JUDGMENT—Mar. 31, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Iowa State Traveling Men's Association, a corporation, have and recover against Floy P. Baldwin the sum of Twenty Dollars for its costs herein and have execution therefor.

[fols. 59-63] Petition for rehearing, covering five pages, filed May 28, 1930, omitted from this print. It was denied and nothing more by order June 11, 1930.

[fol. 64] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—June 11, 1930

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Motion of Appellant for Stay of Mandate Pending Application for Certiorari—Filed June 19, 1930

Appellant shows to the court that in view of its having denied on June 11th, 1930, her petition for a rehearing of its decision herein affirming the judgment of the District Court in favor of the defendant appellee herein, appellant will file her application in due course in the Supreme Court of the United States for a writ of certiorari to this court to review its said judgment, and therefore respectfully prays this court to stay its mandate herein for a reasonable time to enable appellant to apply for and obtain such writ of certiorari.

C. W. Prince, Jas. N. Beery, Denton Dunn, Attorneys for Appellant. F. W. Lehmann, Jr., of Counsel.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—June 20, 1930

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed and proof by affidavit of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF APPELLANT FOR EXTENSION OF STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI—Filed July 18, 1930

Appellant shows to the Court that on June 11, 1930, her petition for rehearing was denied herein of the court's decision affirming the District Court judgment in favor of defendant, appellee herein, and that on June 20, 1930, the court ordered the mandate herein stayed thirty days therefrom to allow appellant to file and have notice served on the clerk of this court of the filing of her application for writ of certiorari from the Supreme Court of the United States to this court for review of said judgment.

[fol. 66] Appellant further states that owing to physical disability and medical expense on account thereof that she has had to incur unexpectedly at this time, she has been unable to deposit as yet with the clerk the expense of preparation of the record and other expense of filing her application for certiorari, and therefore respectfully prays the court to extend its stay of the mandate herein for thirty days within which time appellant is confident that she can raise the expense and file her application, which she

is making not for delay but because she believes, and her counsel believes, that she has been aggrieved by the judgment of the court..

Appellant further states that she has made all deposits and paid all costs that have been demanded of her in the unsuccessful prosecution of her suit herein both in the District Court and in this court, and believes that her deposits are sufficient to cover most all if not all of the costs including the attorneys fees taxable in *in* said courts, but that this order is asked for in order that in case of granting of said certiorari application the mandate may be withheld until the final disposition thereof in order that the case may proceed in an orderly manner, and not to stay any judgment for debt.

C. W. Prince, Jas. N. Beery, Denton Dunn, Attorneys for Appellant. F. W. Lehmann, Jr., of Counsel.

Duly sworn to by Denton Dunn. Jurat omitted in printing.

[fol. 67] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER FURTHER STAYING ISSUANCE OF MANDATE—July 22, 1930

On consideration of the motion of appellant, supported by affidavit, for a further stay of the mandate for a period of thirty days pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, further stayed for a period of thirty days, and if within said stay there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed and proof by affidavit of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

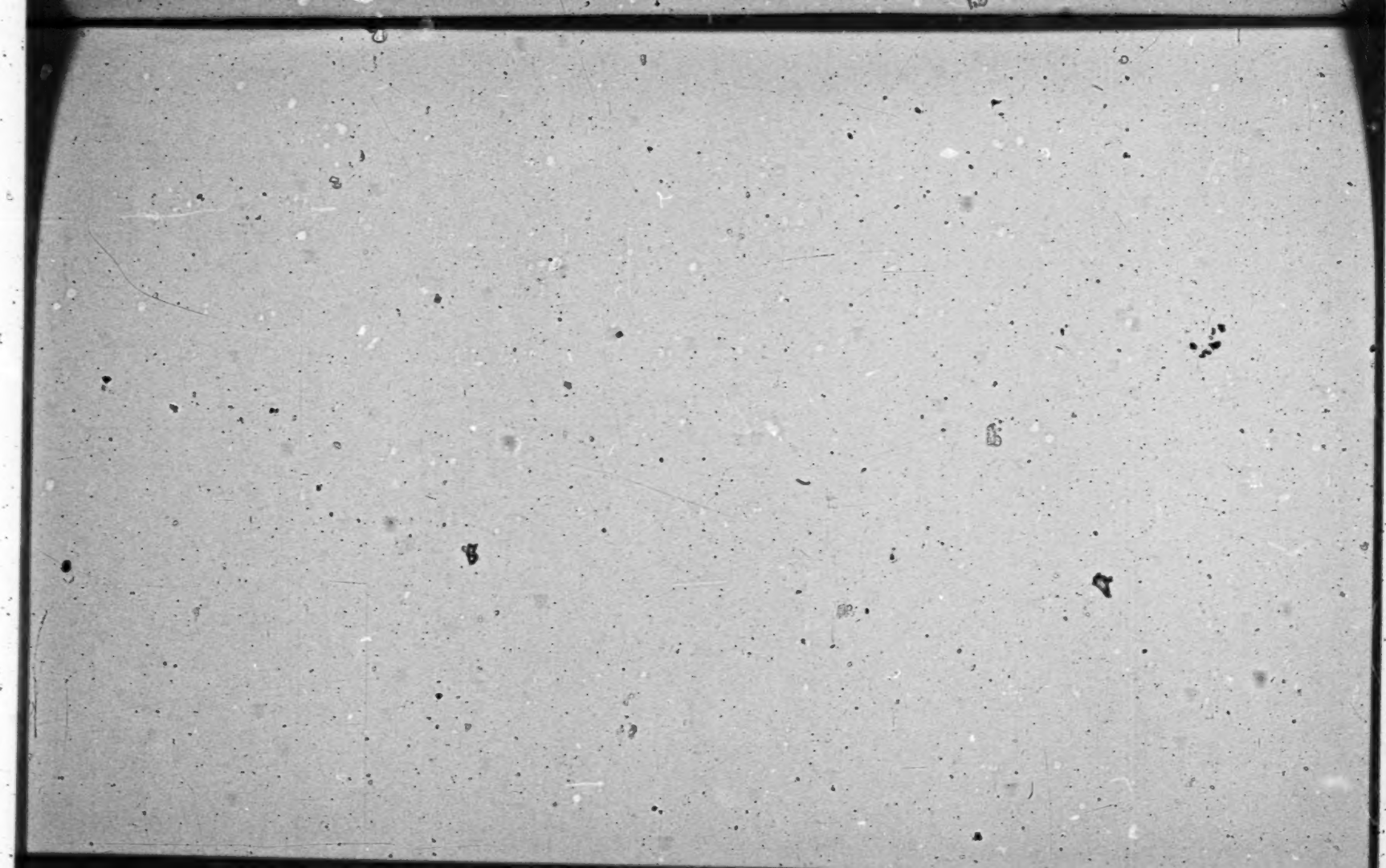
[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,367. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 445. Floy P. Baldwin, petitioner, vs. Iowa State Traveling Men's Association. Petition for a writ of certiorari and exhibit thereto. Filed September 9, 1930. File No. 35,367.



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CHARLES ELMORE

No. 445

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

FLOY P. BALDWIN, PETITIONER,

VS.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

C. W. PRINCE,
JAMES N. BEERY,
Counsel for Petitioner.

F. W. LEHMANN, JR.,
DENTON DUNN,
Of Counsel.

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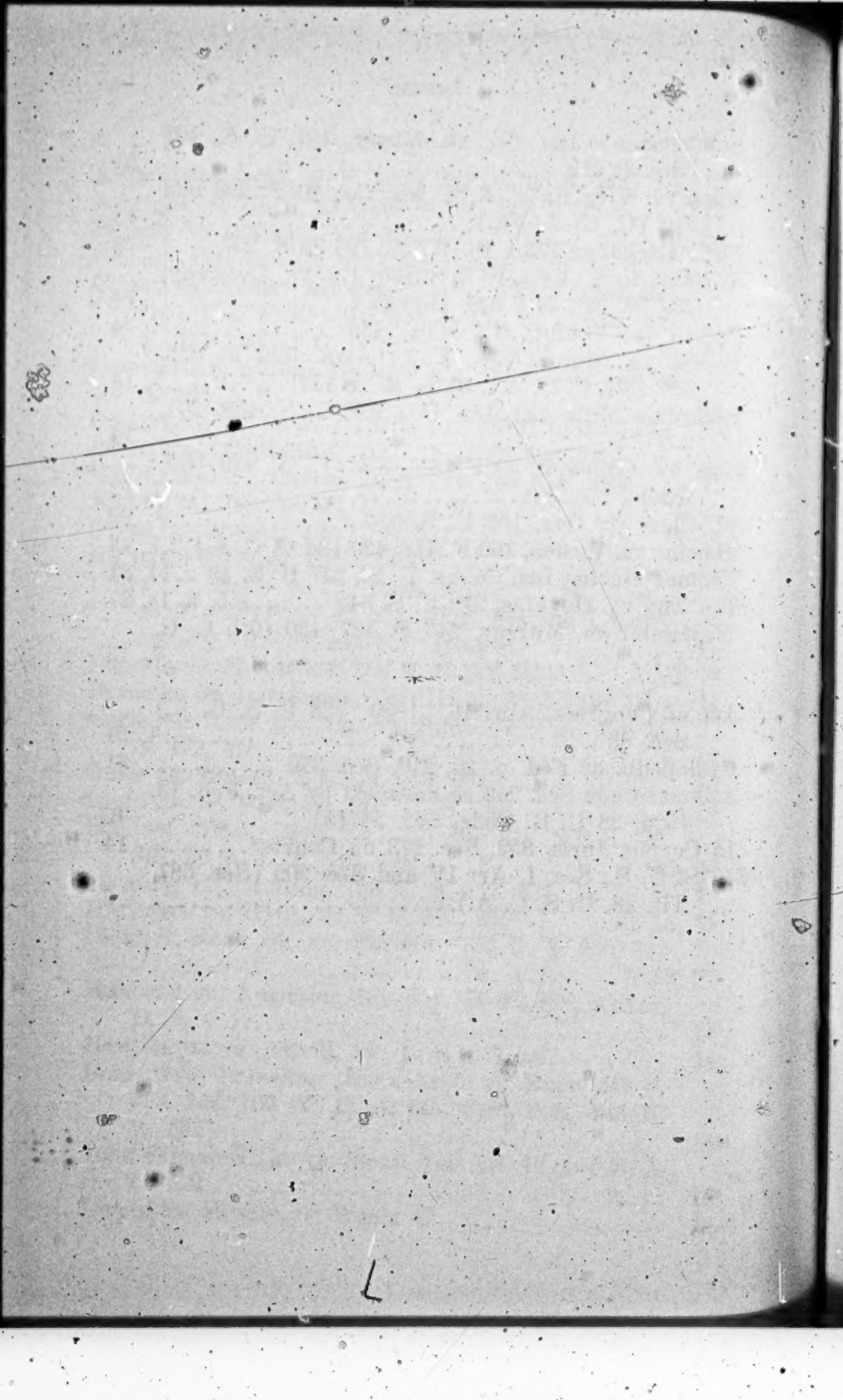

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

FLOY P. BALDWIN, PETITIONER,

VS.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Floy P. Baldwin, respectfully shows as grounds for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit:

A.

Summary Statement of the Matter Involved.

Floy P. Baldwin, petitioner, instituted an action on an insurance policy in the state court of Missouri. On respondent's petition, it was removed to the United

States District Court at Kansas City, Missouri. Respondent appearing specially, moved the quashal of service. After full hearing on both the facts and the law, said motion was overruled. Judgment was later rendered for petitioner for eight thousand two hundred forty ($8,240.00) dollars on respondent's default. No appeal was prosecuted and petitioner being unable to collect in the State of Missouri, instituted this secondary action on the above judgment in the Iowa Federal Court, which after sanctioning a collateral attack by respondent upon said judgment, rendered judgment against the validity of said prior judgment, which was affirmed by the Circuit Court of Appeals, Eighth Circuit.

By this decision rendered on March 29, 1930, a timely motion for rehearing being overruled on June 11, 1930, the United States Circuit Court of Appeals for the Eighth Circuit in affirming the judgment for defendant by the United States District Court for the Southern District of Iowa in this suit on a judgment of the United States District Court for the Western District of Missouri, determined that *collateral attack* upon an authenticated judgment of a United States District Court, sued on in another state, was permissible, under the Constitution and Laws of the United States, for alleged want of jurisdiction of the defendant corporation in the court *a quo*, although the defendant had appeared therein specially to present such question, had had a full hearing thereon of both facts and law by such court having jurisdiction of the subject-matter of the suit, and had permitted such court's decision ad-

verse to it and final judgment thereon to stand unreversed (R. 53).

That said Circuit Court of Appeals further held that "if the judgment had been recovered in a state court of Missouri, the situation might be different," but that "Such is not the rule in the federal courts" (R. 54); and "that, where the question of jurisdiction of the person has been raised (by the defendant) and determined in the court wherein the judgment, upon which suit is brought, was entered," your petitioner's contention that "there can be no examination of the matter in any other court," (except on appeal or writ of error), "is not well founded" (R. 56).

After your petitioner had offered in evidence without objection the authenticated judgment sued on showing therein defendant's overruled motion to quash, the main question arose on the record herein by the trial court's overruling plaintiff's objection to the introduction of evidence under defendant's answer attacking the judgment court's jurisdiction of its person (R. 10-13), on the ground that such answer did not state facts sufficient to constitute a defense to the petition of plaintiff (R. 38), and by like overruling of plaintiff's objections that all defendant's evidence offered attempted to make a collateral attack upon the valid judgment sued upon and to readjudicate issues already adjudicated *inter partes* in the said judgment, and was incompetent, irrelevant and immaterial to any issue in the case (R. 39-40). The trial court's position is shown by its admission for the defendant over plaintiff's objections not only of immaterial portions of the record proper of

the case of the judgment sued on, but also one only of the several affidavits filed on the motion to quash, though not shown to have been incorporated in the record by bill of exceptions (R. 40), and also by its overruling objections to the defendant's secretary's testimony seeking to show that defendant had never done any business in Missouri, nor ever had any agent there, the identical issues adjudged against defendant on its motion to quash (R. 41) in the court *a quo*, and herein decided to the contrary by the trial court's judgment affirmed by the Circuit Court of Appeals. Plaintiff's exceptions to all such rulings were saved (R. 47) and covered in her assignments and specifications of error (R. 23).

The fundamental question involved then is whether the courts of the United States recognize in such a case the rule of *res judicata*, or estoppel by judgment, *inter partes*, as distinguished from purely *ex parte* proceedings in the court of first instance, and do not permit a retrial of issues already adjudicated *inter partes*.

A secondary question of federal practice was also involved by the defendant's having, after quashal of the first service and before the second service in the case (afterwards sustained), *sua sponte* filed its motion in the court *a quo* to dismiss for lack of diligent prosecution by plaintiff, and said Circuit Court of Appeals further holding that such a motion, although overruled, was not a general appearance (R. 54), as your petitioner contended it was by virtue of the Act of Congress of April 16, 1920 (28 U. S. C. A., Sec. 83), allowing the retention of jurisdiction by district courts

of removed cases after quashal of service therein for the issuance of new process where desired by the plaintiff.

B.

Reasons Relied on for Allowance of the Writ.

Your petitioner contends that a writ of certiorari should be allowed and that the decision of the Circuit Court of Appeals should be reversed by this court for these reasons:

1. The decision has overlooked the estoppel by judgment against the respondent in the court *a quo* upon the question of the jurisdiction of its person by reason of its appearing in said court and submitting thereto its jurisdictional objections upon the evidence of the parties, and, after the overruling of same after full hearing, allowing the final judgment, herein sued on, to go against it in the cause and stand unreversed without suing out writ of error therefrom (*Evers* v. *Watson*, 156 U. S. 527; *Forsyth* v. *Hammond*, 166 U. S. 506, 517).

2. The decision overlooks the fact that the United States District Court for the Western District of Missouri had jurisdiction of the subject matter of the suit on a $5,000.00 insurance policy of the defendant Iowa corporation brought against it by your petitioner, then a citizen of Kansas City, Missouri, in the Circuit Court of Jackson County, Missouri, and removed by the defendant to such federal court, and that therefore the latter court had jurisdiction to hear and determine defendant's motion to quash the service of summons as

made upon it in said cause, so that said court's overruling of said motion and entry of judgment thereafter in said cause in favor of plaintiff and against the defendant was a final judgment *inter partes*, subject only to review by writ of error, and not to collateral attack (*Germania Life Ins. Co. of New Orleans* v. *State of Wisconsin*, 119 U. S. 473, 476; *Harding* v. *Harding*, 198 U. S. 317, 337).

3. The decision overlooks the fact that respondent had its day in court upon its objections to the jurisdiction of its person by said Federal Court of Missouri by submitting them to such court by its motion to quash the service as made upon it therein and receiving full hearing thereon by said court, and that after said court had overruled said motion and entered final judgment in said cause in favor of plaintiff and against the defendant, respondent, when sued on said authenticated judgment in the United States District Court of Iowa, was estopped by such final judgment *inter partes*, standing unreversed and not set aside, to contend that it had not been lawfully summoned in said first court and that said judgment was rendered without due process of law, because such judgment *inter partes* adjudicated jurisdiction of the person of defendant as well as the merits (*Toy Toy* v. *Hopkins*, 212 U. S. 542; *Harkness* v. *Hyde*, 98 U. S. 476, 479).

4. The decision denies to your petitioner her rights under the Constitution of the United States as a citizen thereof, and particularly under Section I of Article IV thereof, and Section 905, Revised Statutes of the United States (Sec. 687, Tit. 28, U. S. C.

A.), requiring the duly authenticated transcript of judgment sued on and offered in evidence herein to have such faith and credit given it in every court within the United States as it had by law and usage in the court of the state from which it was taken, in that under the law of Missouri, and all law, federal and state, after the overruling of defendant's motion to quash the service upon it the final judgment of said Federal Court of Missouri in pursuance thereof, was not subject to collateral attack, as allowed by the trial and appellate courts herein (*Hall* v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 761, 52 A. L. R. 723, 740; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29).

5. The decision, in holding that a judgment of a United States District Court is not entitled to the same degree of faith and credit in another state, and the same immunity from collateral attack therein, as judgments of the state courts under similar circumstances, has determined a federal question in conflict with applicable decisions of this court, the Supreme Court of the United States (*Embry* v. *Palmer*, 107 U. S. 3. 9; *Hancock Nat'l Bank* v. *Farnum*, 176 U. S. 640, 645; *Toy Toy* v. *Hopkins*, 212 U. S. 542).

6. Said Circuit Court of Appeals has rendered a decision herein in conflict with other Circuit Courts of Appeals on the same matter (*Westwater* v. *Murray*, 245 F. 427, 430, (6th C. C. A.); *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 F. 453, 458 (6th C. C. A.), 61 L. R. A. 717; *Sipe* v. *Copewell*, 59 F. 470, 8 C. C. A. 419 (6th Cir.) *Thomas* v. *Virden*, 160 F. 418, 420

(2d C. C. A.); *Chinn* v. *Foster-Milburn Lumber Co.*, 195 F. 158, affirmed in *Foster-Milburn Lumber Co.* v. *Chinn*, 202 F. 175 (2d C. C. A.); *Moch* v. *Virginia Fire & Marine Ins. Co.*, 10 F. 696 and 710 (C. C. A. Va.) per Hughes, D. J. and Bond, Circuit Judge, in 1882, a two judge decision antedating the circuit courts of appeals.

7. Said Circuit Court of Appeals, by holding herein that a defendant can appear in a court having jurisdiction of the subject matter of the action and attack the jurisdiction of its person, and then retire with immunity after such court accords full hearing to such objections and overrules the same, and that such defendant can thereafter, when sued on the final judgment of such court rendered in pursuance of such ruling, make collateral attack on such judgment for lack of jurisdiction of its person, has decided an important question of general law in a way untenable and in conflict with all reported authority discoverable by extended research, as will be shown in our brief in support hereof.

8. The decision, in approving a retrial over the objections and exceptions of your petitioner, by a coordinate court of an identical issue already adjudicated *inter partes* by a court of competent jurisdiction, and thereby allowing the defendant another day in court on such issue, and by treating the appeal from the United States District Court for the Southern District of Iowa herein in the suit on the judgment as if it were an appeal from the United States District Court for the Western District of Missouri which

rendered the judgment sued on, has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision herein.

9. The decision overlooks the fact that your petitioner objected upon the trial and excepted to the introduction of evidence under respondent's answer seeking to make collateral attack upon the judgment sued on, on the ground that the record showed that the jurisdiction of the person of the defendant by the court *a quo* had been therein adjudicated *inter partes* upon the defendant's own motion submitted thereto, and the final judgment sued on herein had been entered in said court without reversal thereof, and that therefore it was error for the trial court herein to retry said issue so finally adjudicated and find contrary to such adjudication, as it did, over the continued objection and exception of your petitioner.

10. The decision overlooks the record fact that the evidence submitted by the parties to the court of the judgment sued on herein, was not before the trial court herein, not having been preserved of record nor offered herein, and that therefore the latter court could not pass on the same as a matter of law, even if it had jurisdiction to do so as against estoppel by final judgment *inter partes* thereon, and that the Appellate Court likewise could not on appeal pass adversely upon the primary sufficiency of such evidence to support the jurisdiction of the court *a quo*, nor pass upon the question anew upon the evidence offered by

the defendant herein over your petitioner's objections and exceptions.

11. The decision also erred in the construction of the federal law in holding that defendant's volunteer motion to dismiss in the court *a quo,* after the quashal of the first service against it and before further service attempted, was not a general appearance in said court, especially in overlooking the effect of the Act of Congress of April 16th, 1920 (28 U. S. C. A., Sec. 83), allowing the retention of jurisdiction by District Courts of removed cases after quashal of service therein for the issuance of new process where desired by the plaintiff in such cases.

12. The main question involved of the inviolability under the Constitution and laws of the United States in every court of the United States of a final unappealed judgment *inter partes* of a court of the United States, having jurisdiction of the subject matter of the action, is one of such fundamental importance in our system of jurisprudence that it ought to be declared again in this Court beyond possibility of misunderstanding by any lower court, an opportunity afforded by this application, so that no court within the United States may again put such a judgment of a court of the United States on the same or even a lower plane of faith and credit than that of a court of an alien country, as done in the case at bar.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United

States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify to and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8707, Floy P. Baldwin, appellant vs. Iowa State Traveling Men's Association, a corporation, appellee, and that the said judgment of the said United States Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Floy P. Baldwin,

By C. W. PRINCE,
JAMES N. BEERY,
Counsel for Petitioner.

F. W. LEHMANN, JR.,
DENTON DUNN,
Of Counsel.

Supreme Court of the United States. October Term, 1930. Floy P. Baldwin, Petitioner, vs. Iowa State Traveling Men's Association, a corporation, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in *Floy P. Baldwin* v. *Iowa State Traveling Men's Association, a corporation,* 40 F. (2d) 357 (R. 53). The District Court's opinion (R. 19) was not reported.

II.

Jurisdiction.

(a) The statutory provision believed to sustain jurisdiction is Sec. 240 of the Judicial Code as amended by the Act of February 13th, 1925, 28 U. S. Code, Sec. 347 (a).

(b) The judgment sought to be reversed was rendered on March 31st, 1930 (R. 56). Petition for rehearing was duly filed May 28, 1930 (R. 61), and was denied June 11th, 1930 (R. 61).

(c) The nature of the case and the rulings relied upon as the basis of this court's jurisdiction are shown in the petition for certiorari hereinbefore set forth, and hereinafter in this brief.

(d) Cases believed to sustain the jurisdiction of this court are:

Germania Life Ins. Co. of New Orleans v. *State of Wisconsin*, 119 U. S. 473, 476.
Toy Toy v. *Hopkins*, 212 U. S. 542.
Harkness v. *Hyde*, 98 U. S. 476, 479.
Embry v. *Palmer*, 107 U. S. 3, 9.
Hancock Nat'l Bank v. *Farnum*, 170 U. S. 640, 645.
Chicago Life Ins. Co. v. *Cherry*, 244 U. S. 25, 29.
Dowell v. *Applegate*, 152 U. S. 327, 337, 340.
Evers v. *Watson*, 156 U. S. 527.
Forsyth v. *Hammond*, 166 U. S. 506, 517.
Harding v. *Harding*, 198 U. S. 317, 337.
Westwater v. *Murray*, 245 F. 427, 430 (C. C. A. 6th).
Phelps v. *Mutual Reserve Fund Life Ass'n*, 112 F. 453, 458 (C. C. A. 6th), Lurton, Day and Severens, JJ., 61 L. R. A. 717.
Sipe v. *Copewell*, 59 F. 470, 8 C. C. A. (6th) 419.
Thomas v. *Virden*, 160 F. 418, 420 (C. C. A. 2d).
Chinn v. *Foster Milburn Lumber Co.*, 195 F. 158, aff. in *Foster-Milburn Lbr. Co.* v. *Chinn*, 202 Fed. 175 (C. C. A. 2d).
Moch v. *Virginia Fire & Marine Ins. Co.*, 10 F. 696 and 710 (C. C. Va.), per Hughes, D. J. and Bond, Circuit Judge.
Archer v. *Heath*, 30 F. (2d) 932 (C. C. A. 9th).
Hall v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 761, 52 A. L. R. 723, Annotation 740.
Baisley v. *Baisley*, 113 Mo. 544.
John Simmons Co. v. *Sloan*, 142 Atl. 15, 104 N. J. L. 612.
Albright v. *Boyd*, 85 Ohio St. 34, 41.
Ederheimer v. *Carson Dry Goods Co.*, 105 Ark. 488.
Gunn v. *Howell*, 27 Ala. 663, 667.

Peters v. *Young*, 122 Mich. 484.
Ex parte Kellogg, 6 Vt. 509.
Lively v. *Husely*, 60 Wash. 47.
Hubbard v. *American Inv. Co.*, 70 F. 808, Shiras, D. J.
Riverdale Mills v. *Mfg. Co.*, 198 U. S. 188, 201, 202.
Northwestern Casualty & Surety Co. v. *Conaway*, 230 N. W. 548, 549 (Iowa).
Commercial Mutual Accident Co. v. *Davis*, 213 U. S. 245.
Iowa State Traveling Men's Ass'n v. *Ruge*, 242 F. 762, 763, 765 (C. C. A. 8th, Cert. den., 245 U. S. 657).
Freeman on Judgments, Vol. III, p. 2835 (5th Ed.).
15 Corpus Juris, 852, Sec. 173 on *Courts*.
Thomas Marine Ins. Co. v. *U. S.*, 237 U. S. 19.
Huntington v. *Attrill*, 146 U. S. 657, 667.

III.

Statement of the Case.

This suit began in the United States District Court for the Southern District of Iowa (R. 2). The amended petition (R. 3) on which the case was tried, seeks recovery upon an $8,240.00 judgment, with six per cent interest per annum thereon from its rendition, with $26.80 costs, on January 4, 1927, by the United States District Court for the Western District of Missouri, Western Division at Kansas City in favor of your petitioner and against the respondent, with a transcript thereof, duly authenticated under R. S. Sec. 905, 28 U. S. C. A., Sec. 687, attached (R. 5).

The petition and exhibit show the first suit began June 9, 1922, in the Circuit Court of Jackson County,

Missouri at Kansas City, by your petitioner as beneficiary upon a $5,000.00 insurance policy of defendant, who removed the case to the United States District Court, at Kansas City, on the ground that plaintiff was a citizen and resident there, and the defendant an Iowa corporation.

That defendant appeared specially in said United States District Court, moving to quash the first service of summons, the nature of which does not appear herein, and to dismiss the cause; that October 22, 1923, said motion to quash was sustained but dismissal denied (R. 6); that June 17, 1924, defendant reciting that it appeared specially, filed its motion to dismiss the cause on the ground that plaintiff had taken no further steps or action since the quashal of service aforesaid, and that on the state of the record defendant was entitled to dismissal of the cause at the cost of plaintiff (R. 13, 14) which motion was overruled November 24, 1924 (R. 6).

That November 18, 1924, alias summons was issued in said cause and return of service by the United States marshal on O. C. Sheley as agent of defendant filed on November 10, 1924 (R. 7, 8); that on January 26, 1925, defendant filed its motion to quash said last service, reciting as grounds thereof that it was not doing business in Missouri, and that said Sheley was not its agent (R. 29, 30), which motion was argued and submitted to the court upon the affidavits and briefs filed by both parties, and was on January 26, 1926, by the court overruled and the defendant given thirty days to plead further (R. 7). That on January 4th,

1927, said court further found that defendant had failed to plead further as required, and rendered judgment by default *nil dicit* against the defendant, embodying therein its finding in the overruling of said motion to quash, that defendant was when served doing its regular business in the State of Missouri in such manner and extent as to warrant the inference of its presence there and that said Sheley so served as its agent within the jurisdiction was its proper and legal agent under the law of the forum for service in Jackson County, Missouri, and upon proof made assessed the damages aforesaid (R. 8).

The petition further alleges that defendant's so appearing, filing and submitting its motion to quash upon the evidence of both parties and suffering the same to be overruled and final judgment to be entered by said court, without suing out writ of error therefrom, finally adjudicated the jurisdiction of its person, and expressly so under the law of the forum of the court, *i. e.*, the State of Missouri by the decisions of its court of last resort (R. 4).

The answer admits and exhibits the volunteer motion to dismiss of June 17, 1924, and denies that defendant ever did business in Missouri, or that said Sheley ever was its agent, and alleges that to enforce said judgment would deprive defendant of due process of law (R. 10).

The reply is a general denial, coupled with a plea of estoppel by the judgment on the issues raised by the answer (R. 14). Written waiver of jury having been filed, plaintiff offered authenticated copies of the

judgment sued on (R. 5), of the court order overruling the special motion to dismiss (R. 29), of defendant's motion to quash of January 26, 1925 (R. 29), and of the order of said court overruling same (R. 31), all without objection, and rested.

Over the objections and exceptions of plaintiff that the answer stated no legal defense to the petition on the judgment (R. 38) the defendant was allowed to offer authenticated copies of portions of the files of the original suit and the testimony of its secretary, H. E. Rex (R. 40) seeking to prove by his testimony and conclusions that it had never done any business in Missouri, nor ever had any agent therein, all over the objections and exceptions of plaintiff as to competency, materiality or relevancy to any issue raised by the pleadings.

The foregoing was all the evidence offered, and the trial court thereafter filed its special findings of fact (R. 18), based upon the testimony aforesaid admitted over plaintiff's objections and exceptions, which findings were to the effect that defendant had never done any business in Missouri and never had any agent therein, and exactly contrary on the identical issues to the findings contained in the judgment sued on, embodying the overruling of defendant's motion to quash, and the trial court herein likewise filed its conclusion of law (R. 19), over plaintiff's exception allowed, ordering plaintiff's petition dismissed on the merits at her costs, in pursuance of which order judgment was entered, from which your petitioner perfected her bill of exceptions (R. 28) and appeal to said Cir-

cuit Court of Appeals, resulting in an affirmance there, now sought to be reviewed here.

IV.

Specifications of Errors.

The assigned errors intended to be urged are:

1. That the District Court erred in overruling plaintiff's objection to the introduction of any evidence under the defendant's answer on the ground that said answer does not state facts sufficient to constitute a defense to the petition of the plaintiff, and the Circuit Court of Appeals erred in not reversing such ruling.

2. That the District Court erred in finding for the defendant and in not finding for the plaintiff, upon the pleadings in the cause, upon which the case was tried by the court, and the Circuit Court of Appeals erred in affirming such District Court finding.

3. That the District Court erred upon the facts found by the court in finding for the defendant, and in not finding for the plaintiff, upon the judgment against defendant sued on by her, and the Circuit Court of Appeals erred in affirming such District Court ruling.

4. That the District Court erred in holding that the defendant was not estopped from questioning the judgment against it sued on herein by its having submitted by motion to quash service the question of the jurisdiction of the United States District Court for the Western District of Missouri over its person to said latter court and receiving after hearing a decision

of said court upholding its jurisdiction over the person of said defendant, remaining unappealed from and not set aside, and resulting in said judgment sued on herein, and the Circuit Court of Appeals erred in affirming such ruling.

5. That the District Court erred in permitting the defendant to make a collateral attack upon the judgment sued on herein of the United States District Court for the Western District of Missouri, after it had appeared in said latter court in the suit resulting in said judgment specially to submit therein the question of the jurisdiction of said court over its person, and said court had upon hearing of said question overruled said jurisdictional objections so submitted, and thereafter entered a final judgment by default against the defendant now sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

6. That the District Court erred in holding that the overruling, after hearing the evidence and argument of the parties thereon, of the defendant's motion to quash the service on it, by the United States District Court for the Western District of Missouri, was not *res judicata* of said court's jurisdiction over the person of defendant after resulting in the judgment against defendant which remaining unreversed and not set aside, sued on herein, although defendant appeared specially only in said first suit to raise and submit to said court jurisdictional issue, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

7. That the District Court erred in holding that the judgment sued on in this cause was subject to collateral attack therein by the defendant, and that the United States District Court for the Southern District of Iowa could in this action, over the objection and exception of plaintiff, receive evidence and substitute its findings thereon for those of the United States District Court for the Western District of Missouri, upon the issue of the latter's jurisdiction of the person of the defendant in the suit resulting in said judgment, although it appears therein and herein that defendant had appeared in said former suit and specially submitted to that said court said issue of jurisdiction of its person therein and said court had overruled defendant's objections to such jurisdiction after hearing thereon *inter partes*, and had thereafter entered final judgment against defendant in said cause and in favor of plaintiff, which judgment having remained unreversed and not set aside, is sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

8. That the District Court erred in denying to the plaintiff her constitutional rights under the Constitution of the United States, and particularly under the Full Faith and Credit Section I of Article IV thereof, and Sec. 905, Revised Statutes of the United States (Sec. 687, Title 28, U. S. C. A.), enacted in pursuance and by authority of said constitution, requiring the duly authenticated transcript of judgment sued on and offered in evidence herein to have such faith and credit given it in every court within the

United States, as it had by law or usage in the court of the state from which it was taken, in that the court herein denied to plaintiff recovery herein upon said authenticated judgment sued on herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

9. That the District Court erred in refusing to follow in this case the law or usage of the State of Missouri to the effect that a defendant who appears in a suit in a court, having jurisdiction of the subject matter of such suit, to question the court's jurisdiction over his person, and submits said question on evidence offered by it to said court, and allows such court's final judgment sustaining said jurisdiction to stand without reversal or setting aside, has had his day in court on said question of jurisdiction, and is estopped by such final judgment to question said jurisdiction, in an action on said judgment in every court within the United States, as this court erroneously permitted defendant herein to do over plaintiff's objection and exception, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

10. That the District Court erred in permitting the defendant over the objection and exception of plaintiff to adduce evidence seeking to show that it had never done any business in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, nor ever had any agent in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, when both the primary record and evidence herein showed that defendant had litigated all

said questions in the original suit in the Federal Court of the State of Missouri, and was estopped of record thereon by the overruling of its motion to quash service upon it by said latter court raising all said questions embodied in the final judgment of said United States District Court for the Western District of Missouri, standing unreversed and not set aside and sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

11. That the District Court erred upon the primary record of this cause in not finding that plaintiff was entitled to recover herein and in finding that defendant was entitled to have said cause dismissed with prejudice upon the merits at the cost of plaintiff, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

12. That the District Court erred upon the whole record in finding for the defendant and against the plaintiff as prayed by her, and the Circuit Court of Appeals erred in affirming and in not reversing such ruling of the District Court.

13. That the District Court erred in admitting in evidence the affidavit of O. C. Sheley filed in the Federal Court in Kansas City, on April 28th, 1925, offered in evidence upon the trial of this cause by the defendant over the objection of plaintiff that the same was incompetent, immaterial and irrelevant to any issue in the case, and the Circuit Court of Appeals erred in not reversing such ruling.

14. That the District Court erred in admitting in evidence the testimony of H. C. Rex, an officer of de-

fendant that defendant had never done any business in Missouri, nor ever had any agent therein, over the objection and exception of plaintiff, that such evidence was an attempt to attack collaterally the judgment sued on and pleaded, and that such testimony was incompetent, irrelevant and immaterial, and an attempt to readjudicate issues already adjudicated by the judgment pleaded and sued upon, and the Circuit Court of Appeals erred in not reversing such ruling of the District Court.

15. That the District Court erred in not holding that the defendant was also estopped from questioning herein the jurisdiction of the Missouri Federal Court to render the judgment sued on herein by reason of defendant's having filed in said court on June 17th, 1924, its motion as admitted by its answer herein, as an exhibit thereto, to dismiss said former suit for lack of diligent prosecution of same by plaintiff; and in not holding that the filing of said motion and submission of same to that court, constituted a general appearance by defendant in said cause, and the Circuit Court of Appeals erred in affirming and in not reversing such District Court ruling.

16. That the District Court erred upon the record herein in not finding that plaintiff was entitled to recover judgment herein against the defendant for the sum of $8,240.00 with six per cent (6%) interest per annum thereon from January 4th, 1927, to the date of rendition of judgment herein, plus $26.80 costs shown as costs taxed against the defendant, as shown in the authenticated transcript of judgment sued on, and

for the costs herein, and the Circuit Court of Appeals likewise so erred in affirming the District Court's judgment of dismissal of the petition on the merits at your petitioner's costs, and in not reversing such judgment and ordering judgment rendered for petitioner as above prayed by her.

17. The Circuit Court of Appeals erred in holding that the federal rule does not recognize the doctrine of estoppel by judgment *inter partes* of a federal court having jurisdiction of the subject matter involved, and such a judgment's immunity from collateral attack.

18. The Circuit Court of Appeals erred in holding that defendant's filing of a motion to dismiss for lack of diligent prosecution after quashal of first service, and before the later service, was not a general appearance, though recited as special.

19. The Circuit Court of Appeals erred in holding that it and the trial court could pass upon as a matter of law the sufficiency of the evidence in the court *a quo* to sustain such court's finding and judgment *inter partes* sued on herein, or retry such issue over plaintiff's objection and reverse such finding on collateral attack herein thereon.

20. The Circuit Court of Appeals erred in passing on the appeal herein as if it were an appeal from the judgment sued on instead of from a judgment sustaining a collateral attack thereon.

SUMMARY OF THE ARGUMENT.

Point A.

Special appearance is solely for the purpose of attacking the jurisdiction of the person, and limits the issue submitted thereto, but what it submits is adjudicated *inter partes*, if the court has jurisdiction of the subject matter of the action.

Point B.

Judgments *inter partes* of a competent court are not subject to any collateral attack whatsoever, even though they adjudicate the jurisdiction of the person of the defendant on special appearance only, and even though *ex parte* judgments are subject to jurisdictional inquiry when sued upon. Such *inter partes* judgments are entitled to full faith and credit.

Point C.

The lower courts herein have simply failed to distinguish between direct attacks by appeal or writ of error in the same case and a collateral attack made in another suit. Likewise they have confused jurisdictional inquiries upon first appearance of the defendant in the matter involved with a second appearance of a defendant to question a jurisdiction already adjudicated at its own instance in the first proceeding had. Due process calls for one day in court only.

Point D.

The decision below is contrary to and in conflict with all prior federal and state court decisions on a like state of facts, and with all text writers likewise.

Point E.

A motion to dismiss for lack of diligent prosecution is a general appearance even though recited to be special, the defendant having become an actor in the case by filing such motion.

ARGUMENT.

Point A.

Special Appearance Adjudicates Inter Partes What It Submits.

The unprecedented decision of the Circuit Court of Appeals herein seems due wholly to confusion of thought.

Because the federal courts are liberal in allowing special appearances to object to jurisdiction of the person of defendant, and in allowing appeals from rulings thereon even after defense on the merits, when the exception is saved, the trial and appellate courts herein have erroneously assumed that the overruling of such objections by a court having jurisdiction of the subject matter of the suit is not *res judicata* thereon, even though such ruling is incorporated in a final judgment of the court.

There is neither reason nor precedent for their position, as in all courts a special appearance, while limiting the primary issue thereon, submits the jurisdictional issue to the court and its judgment thereon is final until set aside, or reversed on direct attack by appeal or writ of error therefrom, and is not subject to collateral attack within the United States unless a lack of jurisdiction of the subject matter is shown. *Toy Toy* v. *Hopkins*, 212 U. S. 242; *Hancock Nat'l Bank* v. *Farnum*, 170 U. S. 640, 645.

Point B.

Judgments Inter Partes of a Competent Court Are Not Collaterally Assailable.

Because judgments taken in wholly *ex parte* proceedings, where there was no appearance of the defendant, are subject to jurisdictional inquiry when sued upon, as are also those taken in cases where there is a lack of jurisdiction of the subject matter, notwithstanding there might be either special or general appearance, in order that defendant have a day in a competent court, the Circuit Court of Appeals and District Court have erroneously assumed that the judgment of a competent court rendered *inter partes* is likewise subject to collateral attack as against estoppel by judgment, even when sued on under the full faith and credit clause of the Constitution, and the Acts of Congress enacted by authority thereof, and even on a judgment coming from a State holding such a judgment conclusive. *Hall* v. *Wilder Mfg. Co.*, 316 Mo. 812, 52 A. L. R. 723, 740, citing *Baisley* v. *Baisley*, 113 Mo. 544.

Point C.

The Cases Cited Against Petitioner Are Not Apposite.

The confusion of the courts below herein is also shown by their citations of cases not apposite. They cite no case upholding such a collateral attack as herein, because there is none such in the books, a fact we confidently assert. Their citations are all of cases of *direct* attack on appeal or writ of error, or cases of no appearance at all by defendant in the court

of the judgment sued on, or cases of unauthorized appearance therein by attorney, or cases wherein the subject matter of the original action is not within the jurisdiction of the court, whose judgment is questioned, the latter usually being actions *in rem* or *quasi in rem*. We repeat that there is no case in the books other than the one at bar upholding a collateral attack on a judgment *inter partes* rendered by a court having jurisdiction of the subject-matter.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, cited, the issue turned on the validity of the exercise of a power of attorney to enter appearance in the court *a quo* by a holder, not *owner*, of the judgment note. In *Haddock* v. *Haddock*, 201 U. S. 562, also cited, the report thereof shows Mrs. Haddock served by publication only and that she did not appear in the court *a quo*. Likewise in *St. Clair* v. *Cox*, 106 U. S. 350, and *Compagnie Du Port, etc.* v. *Mead Morrison Mfg. Co.*, 19 F. (2d) 163, the reports show service attempted on purported agents of the corporations sued, but no appearance by either whatsoever in the court *a quo*. Of course, never having tried out or waived the jurisdictional question, all such defendants were entitled to a day in court so to do, when such judgments were invoked against them, but no defendant is entitled to a second day in court to try out again what he has already submitted to a competent court and after hearing has been adjudicated against him.

We have discussed the trial court's opinion (R. 19) *in extenso* in our "Brief for Appellant" herein,

and likewise the Circuit Court of Appeals' opinion in our "Suggestions in Support of Petition for Rehearing," with quotations from our authorities cited *supra* herein, supporting your petitioner's position, with discussions of the lower court's citations, and we are filing nine copies of these briefs herewith that they may be available to the justices of this court in case they care to satisfy themselves of the accuracy of our assertions as to the cases cited in the case at bar. Said briefs are marked respectively "Appendix 1 and Appendix 2" to petition for certiorari herein.

Point D.

All Reported Authority, Including the Decisions of This Court and the Second and Sixth Circuit Courts of Appeals, Is Opposed to the Decision Rendered Below.

Under JURISDICTION (d), *supra* herein, we have cited most of the pertinent decisions on the question of immunity from collateral attack of judgments *inter partes* by courts having jurisdiction of the subject-matter in order to show that the decision below is contrary to the overwhelming weight of authority. From our research we confidently assert that it is a pioneer in the revolutionary doctrine it proclaims. For brevity's sake we forbear discussion of these cases herein, but all will be found supporting our position, which seems to us to rest upon the most fundamental rule of jurisprudence, that every court must be bound by the final unreversed judgment *inter partes* of a court, which had jurisdiction of the subject matter involved.

Point E.

The Volunteer Motion to Dismiss as a General Appearance.

The volunteer motion of the defendant to dismiss, when there was no process outstanding in the case, seems to present a case of first impression on whether such filing was a general appearance, although recited to be special. There is no doubt that motions to dismiss have been filed in former federal practice as motions to quash or set aside the service, which this court said in *Harkness* v. *Hyde*, 98 U. S. 476, was the proper form of attack on jurisdiction of the person, and so treated the motion to dismiss therein. Also prayers to dismiss have been joined with motions to quash or set aside the service. But now we have a new statute of April 16, 1920 (28 U. S. C. A., Sec. 83), applying to removed cases allowing the retention thereof, after quashal of service, for issuance of alias writs to perfect defective service. In our "Brief for Appellant," filed herein as "Appendix 2" (pp. 54-62), we have discussed this question, quoting on page 57 therein, 2 Cyclopedia of Federal Procedure, 210, Sec. 330, so we do not repeat this herein for brevity's sake.

In *Thomas Marine Ins. Co.* v. *U. S.*, 237 U. S. 19, is said:

> "Defendant becoming actor in cause as test of general appearance is the rule of the United States Supreme Court."

It seems to us that the Circuit Court of Appeal's discussion of this issue is solely from a defendant's

view, and overlooks a plaintiff's rights given by the statute to make full effort to serve agents of foreign corporations who may be doing business in plaintiff's domicile, as commented on by this court in *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407 (Syl. 3), 419. We feel that this court should construe the recent statute, *supra*, and that this question of practice is important, even if not so imperatively so as the main question of *res judicata* herein by a judgment *inter partes* by a competent court whose ruling the respondent itself had invoked and therefore was bound thereby upon the question of jurisdiction as well as upon the merits.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervising powers, and that this court should issue a writ of certiorari herein.

C. W. PRINCE,
JAMES N. BEERY,
Counsel for Petitioner.

F. W. LEHMANN, JR.,
DENTON DUNN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

J. M. PARSONS,
Counsel for Respondent.

EARL C. MILLS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

A case was commenced in the Circuit Court of Jackson County, Missouri, June 9, 1922, and was by proper proceedings removed to the Federal Court with a special appearance and a motion to quash the service and dismiss the case. This motion was submitted and sustained so far as to quash the service and the case was allowed to remain standing on the docket under the provision of Section 83 of the Judicial Code. This order was made in October, 1923. On the 24th of June, 1924, the defendant filed a motion in the Missouri

Federal Court to dismiss on the ground that the plaintiff had taken no further steps and in this motion recited that it appeared so for that purpose only. On November 18, 1924 another summons was issued out of the Federal Court, Missouri, and was served on one O. C. Sheley as an agent of the defendant company and on June 26, 1925 the defendant again filed its motion, reciting therein that it specially appeared and for no other purpose than asking that the service be quashed. This motion was submitted on affidavits and the Missouri Federal Court overruled it and gave the defendant thirty days to answer, and it failing to answer entered default and rendered a judgment against the defendant.

On the judgment thus rendered by the Missouri Federal Court, this action was brought in the District Court of the United States for the Southern District of Iowa and was tried before Judge Dewey, district judge. His opinion and finding of facts is set out in the Transcript of Record filed in the C. C. A., commencing at page 16 and ending at page 22. We desire to call the particular attention to the finding of facts on page 16 of this transcript. Also, specially to the particular finding on page 18 of the transcript wherein it is stated "The plaintiff does not claim in this Court that the appearance of the defendant in the State court for the purpose of moving its transfer to the Federal Court was an appearance or conferred jurisdiction of the Federal Court upon the defendant, and it has been held that such appearance for this purpose does not confer jurisdiction" and in the opinion rendered by Judge Dewey who held that the Fed-

eral Court of Kansas City was without jurisdiction and rendered judgment for the defendant. This case went to the Circuit Court of Appeals and the Circuit Court of Appeals, after considering it, rendered its decision set out on page 53 of the printed transcript, ending on page 56.

So if, an examination be made of the finding of facts by Judge Dewey, it will be seen that it appears in the record without dispute that the defendant, the Iowa State Traveling Men's Association, is a corporation organized under the laws of the State of Iowa and has its principal and only place of business in the State of Iowa, having no agents anywhere or in any State and never had any in the State of Missouri and never entered the State of Missouri for the purpose of doing business or consented in any way to the Missouri authorities exercising any control over it. True, it wrote policies or certificates on citizens in practically every state in the union. It employed no agents. The members sometimes solicited others to join; that is, told them of the benefits and applications would be sent to the home office at Des Moines, there be approved and the contract was then completed. In the case of loss, proofs were sent to the home office and the home office sent its check by mail in the event of settlement. The person upon whom the service was made in Missouri was in no way an agent of the defendant. He was sometimes employed by the defendant if it had a report of an accident to make, a physical examination of the party claimed to be injured and report the facts to the company or its association with no powers further.

So, then, it is evident from the record that there was no way that the defendant could be brought into the Federal Court in Missouri excepting with its own consent. It could not be brought into any State Court in Missouri, excepting with its own consent and in neither instance was that consent given.

Therefore, this case presents this question and it seems to us this question only: "Does a non-resident corporation where an attempted service of process is made upon one not an agent of the corporation by appearing in court, specially for the purpose of objecting to jurisdiction confer upon the Court jurisdiction over the person or the corporation?" In other words, is an appearance specially to call attention to the lack of jurisdiction a consent to the exercise of jurisdiction? Respectable cases are cited of courts ruling that where appeal is taken and the party raising the jurisdictional question raises it in the Appellate Court of the State that he is bound by the decision.

We don't have that case here. We have never gone outside of the *nisi prius* court in which the question arose. Simply called attention of the court to the fact that it had no jurisdiction. Is the fact that a court's assertion "jurisdiction" when in fact it has none, sufficient to give that court jurisdiction so that the only method of resisting its action is by appeal? It certainly would not exist if the court did not have jurisdiction of the subject matter. Neither, it seems to us, would it exist if the proper steps had not been taken to get jurisdiction of the person. We invite, particularly, the reading of Judge Dewey's finding of

facts. So, on the whole, without setting out authorities except as contained in other opinions sought to be reviewed, we respectively submit the matter to the court.

J. M. PARSONS,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

BRIEF AND ARGUMENT OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

BRIEF AND ARGUMENT OF RESPONDENT.

The plaintiff in this case commenced a suit against the defendant, the Iowa State Traveling Men's Association, an Iowa Corporation, on June 9, 1922, in the Circuit Court of Jackson County, Missouri, at Kansas City, this being within the Western Federal Judicial District. This cause was transferred to the Federal District Court for the Western District of Missouri on November 15th, 1922. The defendant appearing specially in said court, filed a motion to quash the service of summons made upon it as made in the State court

and dismiss said cause, reciting in said motion that it appeared specially for that purpose; on October 22, 1923, the court sustained the motion to quash the service of summons, but overruled the motion to dismiss.

June 17th, 1924, the defendant again filed a motion in said Federal court to dismiss the case on the ground that plaintiff had taken no further steps or action in the case since the further motion was sustained quashing the service and in said motion it again recited that defendant appeared specially for the purpose of said motion. This motion was overruled on November 24th, 1924.

On November 18, 1924, another summons was issued out of said Federal court and the same was served on one O. C. Sheley in Independence, Missouri, as being an agent of the defendant company, and on January 26, 1925, the defendant again filed its motion, reciting therein that it appeared specially and for no other purpose and asking that the service of summons therein be quashed and the cause dismissed for want of jurisdiction of the person of the defendant. This motion was argued and submitted to the said Missouri Federal court on the briefs and affidavits filed in support and in resistance of said motion and was on January 26, 1926, overruled, the court entering an order permitting the defendant thirty days to plead. The defendant failed or refused to appear at the end of the thirty days. Whereupon a default was requested by the plaintiff as against the defendant and the court proceeded to hear evidence and entered judgment in the sum of $8,240.00, with interest and costs, as against the said defendant.

A suit was then brought on this judgment in the District Court of the United States, Southern District of Iowa, Central Division, which was tried on a stipulation providing for a finding of facts by the court, and from the written opinion and finding of facts filed by the trial court we excerpt the following:

> "Upon the trial of the case in this court after plaintiff had introduced the judgment entry made and filed in the District Court of the United States for the Western District of Missouri, the defendant introduced uncontradicted evidence that said O. C. Sheley was not at the time the purported service of summons was had upon him, or at any other time, an agent or officer of the defendant company, and that the defendant company never transacted any business in the state of Missouri other than the issuance of policies of insurance to residents of said state. That said defendant company was never a citizen or resident of the state of Missouri, and does not now and never did have any office, agency or place of business or property of any kind in said state of Missouri.
>
> "The defendant also offered and produced evidence that O. C. Sheley is a physician and surgeon, who was on occasions employed by the defendant company to examine and report on the condition of policyholders who were making claims under insurance policies issued by the defendant company, but was in no way or manner an agent of such company.
>
> "Further evidence was offered by the defendant company that all contracts of insurance and policies issued by it were so issued upon appli-

cations for such insurance made to it at its home office in Des Moines, Iowa, and that neither in Missouri, nor in any other state, did it ever employ agents to solicit insurance other than its own policyholders should upon their own volition and without pay solicit applications, which, if approved by the home office, were issued by it at Des Moines, Iowa.

"The plaintiff offered no evidence in this court to contradict this evidence introduced by the defendant company, and the same stands undisputed and undenied. The Court, therefore, must find under the evidence in this court that the defendant company was at no time a resident or citizen of the State of Missouri; never transacted any business therein, and never did business within the state or maintained an agency therein that would subject it to the jurisdiction of a federal court of Missouri.

"The Court further finds that O. C. Sheley, upon whom a summons was attempted to be served, was not at that time, nor has he since been an agent or officer of the defendant company. And it follows that the attempted service of the summons upon a policyholder and occasional employe of the defendant was without force and effect, and did not subject the company to the jurisdiction of the federal court of Missouri.

"The plaintiff does not claim in this Court that the appearance of the defendant in the state court for the purpose of moving its transfer to the Federal Court was an appearance or conferred jurisdiction of the Federal Court upon the defendant, and it has been held that such appearance for this purpose does not confer jurisdiction.

"On October 22, 1923, the United States District Court quashed the summons, so that from and after that time the case stood in the United States District Court for the Western District of Missouri as though no summons has been issued.

"Neither does the plaintiff in this Court claim that the defendant by appearing specially by the motion to quash the summons thereafter issued and to dismiss the case for lack of the jurisdiction conferred jurisdiction on the Federal Court. That such special appearance did not confer jurisdiction on such Federal Court has been decided by several cases.

* * * * * * * *

"The plaintiff in this case bases its claim to the validity of the judgment in the said Court solely upon the claim that as the District Court of Missouri found adversely to the defendant on its motion to quash the summons served on O. C. Sheley, that this became *res* (*ad-judicata*) on the question of the jurisdiction of the United States District Court for the Western District of Missouri to render the judgment sued on in this case, and that by reason of said judgment the defendant is estopped of record to challenge the validity of said service of notice on O. C. Sheley, and the Court's finding in its memorandum of decision in ruling on said motion to quash that the defendant was in fact a resident of the State of Missouri at the time summons was so served on it in that state.

"Plaintiff's contention, or at least one of them, being that the defendant having appeared specially to quash such summons, and having

filed affidavits in support thereof, that in as much as the Court had found adversely on such motion the defendant was bound thereby. In other words, it is the claim of the plaintiff, as I understand it, that while the defendant may appear specially in that Court for the purpose of filing and having a hearing on a motion to quash and dismiss, and is not bound thereby because of such special appearance, yet, if the Court rules against it that this becomes a decision *res (judicata)* which cannot be collaterally attacked.

* * * * * * *

"The defendant, therefore, had a right in this Court to attack the jurisdiction of the United States Court for Missouri which rendered the judgment sued upon as having been entered. And the evidence in this case being undisputed that the defendant at no time was a resident of the State of Missouri, and the evidence clearly so showing in this case, it must follow that the Missouri Court was without jurisdiction to enter the judgment and that the same was null and void.

"The plaintiff places considerable reliance upon the fact that the judgment entry in the Missouri Court is entitled to great weight as it expressly finds that the Court has jurisdiction and contains about five type-written pages of findings and conclusions. It is true that a very strong presumption exists as to the validity of any action taken by a United States District Court, and every presumption prevails as to its validity. But, after all, questions of jurisdiction are mere presumptions and are always sub-

ject to collateral attack where the evidence clearly and conclusively shows that the Court was without jurisdiction."

The judgment of the lower court was for the defendant. The case was taken to the Circuit Court of Appeals and that court rendered its opinion affirming the lower court, which is set out at page 51 of appellant's transcript of record filed herein.

Points and Authorities.

1. The business of the defendant, as shown by the record, was such that, without being found in a foreign State, it could not be held to answer. It having no office, only in its home office, in the city of Des Moines, Iowa, employing and having no agents, in Missouri or elsewhere, and transacting its business only by mail, all its contracts being made at its home office. Hence, falling in that line of cases covered by:

Minn. Commercial Men's Assn. *vs.* Bem, 261 U. S. 140;

Higgin *vs.* Iowa State Traveling Men's Assn., 183 Fed. 845;

Tomlinson *vs.* Iowa State Traveling Men's Assn., 251 Fed. 171;

Shwayder *vs.* Ill. State Traveling Men's Assn., 255 Fed. 797;

Crew *vs.* Ill. Commercial Men's Assn., 256 Fed. 248;

Stier *vs.* Iowa State Traveling Men's Assn., 199 Ia., 118.

2. When a motion to quash service on removal from a State court is sustained in the Federal court, process may be issued, and service perfected only in the same manner, as in cases which are originally filed in such court.

Chap. 28, Sec. 83, U. S. Code.

3. The defendant, being a foreign corporation, not being a resident of a Federal district, not being engaged in business therein, and having no agent therein, no process can be served on it in such district on a case depending on diversity of citizenship.

Chap. 28, Sec. 112, U. S. Code.
Goldey *vs.* Morning News Co., 156 U. S. 518;
Chinn *vs.* Foster, 202 F. 175;
Walton, etc., *vs.* Com. Ind. Co., 282 Fed. 21;
Minton *vs.* Wells Co., 261 U. S. 267.

4. A special appearance to quash service, or to object to jurisdiction of the court, is not such an appearance as on overruling the objections to jurisdiction will warrant judgment against the defendant if, in fact, the objections to jurisdiction are good.

Big Vein Coal Co. *vs.* Read, 229 U. S. 31; 57 Law Ed. 1053;
Hitchman Coal & Coke Co. *vs.* Mitchell, 245 U. S. 229; 62 Law Ed. 260;
Toledo Railway & Light Co. *vs.* Hill *et al.*, 244 U. S. 49; 61 Law Edition 982;
York *vs.* Texas, 137 U. S. 15; 34 Law Ed. 604;
Davis *vs.* Cleveland, C., C. & St. L. R. R., 217 U. S. 157; 54 Law Ed. 708;

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 L. Ed. 490;

Morris *vs.* Skandinavian Ins. Co., 279 U. S. 405; 73 Law Ed. 762.

5. Jurisdiction of a court rendering a judgment may always be questioned in a subsequent action on that judgment in another State.

Thompson *vs.* Whitman, 85 U. S. 457; 21 Law Ed. 897;

Pennoyer *vs.* Neff, 95 U. S. 714;

Goldey *vs.* Morning News Co., 156 U. S. 518; 39 Law Ed. 517.

6. Presumption that a court rendering judgment has jurisdiction does not apply to a foreign corporation.

St. Clair *vs.* Cox, 106 U. S. 350; 27 Law Edition 222.

7. Jurisdiction of a court rendering judgment may be questioned on a subsequent suit on that judgment notwithstanding objection was made in the first court to its jurisdiction, and it then specifically held that it had jurisdiction.

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 Law Ed. 491.

When the case in Missouri was transferred from the State court in Jackson County, Missouri, to the Federal court, the motion to quash the service being sustained, the plaintiff therein then stood in the same

position as if the case had been originally commenced in the Federal court in the Western District of Missouri and, as we conceive it, was governed by Section 83, Title 28, of the U. S. Code, Annotated, which is as follows:

> "In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal."

Here by the ruling of the Federal court by reason of a defective process of the State served not on the defendant but one claimed to be an agent of the defendant, though in fact not. Hence, this was no service. The court then ordered new process or so-called *alias* summons. The provision as to service or service may be perfected in such court in the same manner as in cases which are originally filed in such U. S. court.

The new service that jurisdiction is claimed to have been acquired by, was the service on Sheley who was not an agent of the defendant. The defendant being a foreign corporation, doing no business in the State of Missouri, carrying on its business entirely in Iowa, as a mutual insurance organization, was not subject to service therein except in the same manner as if the case had been originally filed in that court. Original process may be served as provided in Section 112, Title 28, of the U. S. Code and in subdivision A thereof, providing as follows:

> "(*a*) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

There is nothing in Sections 113 to 117 of Title 28 of the Code which in any way would authorize the service upon this defendant, being as it was a corporation of the State of Iowa, not doing business in Missouri except by service of process in its own district in a suit commenced therein where the jurisdiction of the court depends upon diversity of citizenship.

So, then, it is our contention in this case that upon sustaining of the motion to quash service originally for

the Missouri court to get jurisdiction of the defendant, it was necessary that the defendant be found within that Missouri district, *i. e.*, that it be engaged in business therein and that it have an agent therein upon whom service could be made.

True, the U. S. District Court of the Western District of Missouri or the U. S. District Court of the Southern District of Iowa would have jurisdiction. In other words, the plaintiff could commence the case in either district so far as filing the same was concerned. She had the right to select in which district she would try it, but the defendant had also the right to require his service be made on it within its own district as required by law, and that could not be done legally by serving it in Iowa and neither could it be done by serving it on the agent of the company and it not doing business in the State of Missouri.

The motion filed on June 17, 1924, conferred no jurisdiction for the reason that there was a special appearance for that purpose and for that purpose only, and for the further reason that this motion was only in furtherance of the thought embodied in the original motion to quash the service.

2.

To this service of the alias summons on Sheley, the defendant filed its motion, appearing specially for that purpose and no other purpose, asking that the same be quashed for the want of jurisdiction of the person of the defendant. The personal jurisdiction depended, of course, upon the proper service of sum-

mons and, as we have seen, it was not served properly. The motion was argued and submitted to the Missouri Federal Court on the briefs and affidavits filed in support thereof but it was overruled. The defendant declining to go further, default was taken against it and judgment rendered which judgment is the judgment in suit.

The trial court found that the defendant company was at no time a resident or citizen of the State of Missouri, never transacted any business therein, and never did business within the State of Missouri or maintained an agency therein that would subject it to the jurisdiction of the Federal Court of Missouri, and further the trial court found that O. C. Sheley, upon whom the summons was attempted to be served, was not at that time, nor has he ever since been, an agent or officer of the defendant company, and as a necessary corollary said and it follows that the attempted service of the summons upon a policyholder, an occasional employee of the defendant, was without force and effect and did not subject the company to the jurisdiction of the Federal Court of Missouri.

Now the lower court further found that the plaintiff based her claim to the validity of the judgment solely upon the claim that as the District Court of Missouri found adversely to the defendant, on its motion to quash the summons served on O. C. Sheley, that this became *res adjudicata* on the question of the jurisdiction of the U. S. Court for the Western District of Missouri to render the judgment sued on in this case.

In other words, inasmuch as the court had found

adversely on said motion, the defendant was bound thereby although it appeared specially only for the purpose of raising the question of jurisdiction, and therefore the lower court concluded that the defendant had a right to attack the jurisdiction of the U. S. Court from Missouri which rendered this judgment sued on, the evidence being undisputed that the defendant was at no time a resident of the State of Missouri, and the evidence clearly so showing, it must follow that the Missouri court was without jurisdiction to enter the judgment and that the same was null and void.

We quote these excerpts from the opinion of the trial court for the reason that they go to what we conceive to be the ultimate and controlling principle which must decide this case in this Court.

3.

The defendant in this case is, as made in the statement of facts, an insurance organization, made up of traveling men. It has no agents. Applications are made to it at its home office at Des Moines, Iowa, by mail. They are there approved and a contract entered into and mailed. Assessments are made by mailing money received to keep the contract in force and losses are paid on proofs sent in by mail and checks sent out from the home office.

It is one of that class of corporations that is governed by the decision of this Court in Minnesota Business Men's Association *vs.* Bem, 261 U. S. 140, holding that it is not engaged in business in another State

merely because it writes under these circumstances people residents of other States, and the other cases are cited in Points and Authorities, Part One, one of them, from the Circuit Court of Appeals of the Eighth Circuit, dealing expressly with this defendant. So that there can be no question that this defendant was not amenable to the process of the Courts of the Western Federal District of Missouri, unless the proper conditions existed as to service in that district, which they did not.

Hence, the defendant was in a Kansas City court on a service that did not give jurisdiction of it. They appeared raising the question by a motion to quash the service, appearing specially for that purpose and no other purpose.

The effect of the court overruling this service and then proceeding to get judgment against the defendant was to force this defendant into court on an improper service in a case in which the defendant had not been properly servieed in that district and in a case in which the defendant was a resident of another district.

4.

By special appearance to quash service or to object to jurisdiction of the court is not such an appearance as on overruling on objections to the jurisdiction would warrant judgment against the defendant if in fact the objections to jurisdiction are good.

The finding of the lower court in this case is that the defendant company was at no time a resident or citizen of the State of Missouri, never transacted any busi-

ness therein, never did business within the State, never maintained an agency that would subject it to the jurisdiction of the Federal Court in Missouri, and that the party upon whom the summons was served was not an agent of the company upon whom the summons could be served, he only being specially employed at times to render particular services in examination of persons making claims and making reports to the defendant.

We recognize that this is the question in this case. On this we desire to call the Court's attention to what it said in Big Vein Coal Company *vs.* Read, 229 U. S., p. 31. It said:

> "It is a settled practice in the Federal Courts that an appearance may be made for the sole purpose of raising jurisdictional questions without thereby submitting to the jurisdiction of the court over the action", citing a number of cases in support thereof.

Again, this Court, in Hitchman Coal & C. Co. *vs.* Mitchell, 245 U. S. 229, said in its opinion:

> "The final decree of the district court included an award of injunction against John Mitchell, W. B. Wilson, and Thompson Hughes, who, while named as defendants in the bill, were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection."

Again, in Harkness *vs.* Hyde, cited by the court as authority on the above proposition, from 98 U. S. 476, the court said:

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

The Bank of Jasper *vs.* First National Bank, 258 U. S. 112, the court held that even under the statute of Florida, where on an interlocutory order the defendant appealed from a ruling overruling his objection to jurisdiction, it was not a general appearance and did not confer jurisdiction of the court to try the case.

Now, these statements of the court either mean something or they do not. If by appearing to object to jurisdiction where there is an improper service and no jurisdiction exists in fact, amounts to a general ap-

pearance in the case such as to bind the defendant, then, of course, his only remedy is by appeal, but if it does not, his remedy, after having raised this question, is to withdraw. He has done his duty. He is calling attention to the court that it has no jurisdiction. If it has no jurisdiction it has no right to hold the defendant, hence its finding cannot be held to be *res adjudicata*. In such cases as this the court gets jurisdiction of the person of the defendant by proper notice, *i. e.*, proper process, properly served on the defendant, or the defendant may personally, without any process at all, appear and plead to the merits. Courts do not get jurisdiction of the person of the defendant by dragging him in by any kind of a rope or by force, and then, if he opens his mouth to object, hold him to have appeared. A special appearance, such as is involved here, is notice to the plaintiff and the court that the defendant does not "submit" his person to the jurisdiction of the court to try the case. He is merely pointing out to the plaintiff and the court the fact that he is not legally in court, and will not submit to their trying the merits of the case and will not be bound by any judgment that may be entered against him upon the merits. This we consider to be the point in this case.

As jurisdiction may be always inquired into, this phrase is meaningless unless the defendant had the right on the trial of the case at bar in the lower court to show the facts which negative the jurisdiction of the Kansas City court. These facts were undisputed and the lower court so finds as set out in its opinion. There-

fore, unless the doctrine of *res adjudicata* is to be applied in this case, where the party wrongfully brought into court did not submit himself to the jurisdiction, the certiorari must be denied.

A decision is cited from the courts in Missouri, decided after this case was decided, the case of Hall *vs.* Wilder, 293 S. W. 760; 52 A. L. R. 723. This case was decided after trial of the original case in Kansas City. No rule in Missouri gave prior to that time the effect of the decision that is now claimed in this case. Even if it did, it would have no bearing on the Federal Court case decided under the circumstances of this case, *i. e.*, bringing the defendant into a wrong district upon an improper service. Now it may be urged that the rule we contend for here is unjust to the plaintiff. The plaintiff and her able battery of attorneys knew very well that the defendant could be sued in the State of Iowa, either in the State court or in the Federal District Court of the Southern District, Central Division, sitting at Des Moines. That there the case could be tried upon the merits of the original facts involved, but following the Missouri practice, because of the peculiarities in that statute which allow a claim on a $5,000 policy to grow into almost $9,000, they saw fit to step into the Missouri court, knowing that there was no jurisdiction existing there. They were notified of this in ample time by a filing of a motion to quash the service in the original case, and after the sustaining of that by the Federal courts they still persisted. If they are in any difficulties now, the difficulties are their own making. We think the Fed-

eral Court for the Western District of Missouri had no jurisdiction under the record to enter the judgment sued on in this case and that the writ of certiorari should be denied.

Respectfully submitted,

J. M. PARSONS,
Attorney for Respondent.

EARL C. MILLS,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION

SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT.

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EARL C. MILLS,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION

SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT.

This supplemental brief is filed because the writer had received notice the case would not come on for hearing until April 13th, or after, but received a telegram it might come on the week beginning March 16th, hence necessitating a hurried preparation so as to have something of a brief on file. While not departing from the view of the original brief, we desire to point out further reasons for the denial of the writ.

We wish to add to the points, the following:

8. The Missouri Federal Court had no jurisdiction to enter a personal judgment under the record, which shows that at all times the defendant herein objected to the jurisdiction on proper grounds, and appeared for that purpose and no other and never submitted itself to the jurisdiction of the Missouri courts, or the Federal court.

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 L. Ed. 491.

Mich. Central R. R. Co. *vs.* Mex., 278 U. S. 492; 73 L. Ed. 471.

9. Notwithstanding any rule of the Missouri courts, the Federal courts, when a case is removed from the State court, applies the Federal rule as to whether the defendant is properly before the court.

Mechanical Appliance Co. *vs.* Castlemen, 215 U. S. 437; 54 Law Ed. 272.

10. Want of jurisdiction may be shown notwithstanding recitals in the record; that is recitals of record may be disputed.

Sullivan *vs.* Keeney, 148 Iowa 361.

Thompson *vs.* Thompson, 89 N. J. Equity 70; 103 Atlantic 856.

Hanna *vs.* Steadman, 230 N. Y. 236; 130 N. E. 566.

Galpin *vs.* Page, 18 Wal. 350; 21 Law Ed. 519.

ARGUMENT.

The Bank of Jasper *vs.* First National Bank of Rome, 258 U. S. 112; 66 Law Edition 491. This case in our view settles the controversy herein.

The first National Bank of Jasper, Florida, issued its certificates of deposit to the American Bank & Trust Company of Rome, Georgia, on account of notes given to the Rome Insurance Company of Georgia to raise capital. These notes were transferred by the American Bank & Trust Company to the First National Bank of Rome which brought suit on the certificates of deposit. Prior to that in litigation commenced in the State court in Florida against the three Georgia corporations involved, service was attempted to be made upon the Georgia corporations by publication. These corporations appeared specially, solely and only for the purpose of moving to quash the service. The motion was overruled by the State court and appeal taken to the Supreme Court on the interlocutory order. The agreement, however, being that this was not to be considered a general appearance. The Supreme Court sustained the lower court and when the case came back the Florida State court decree was entered *pro confesso* against all of the defendants, the three Georgia corporations, and specifically provided that the certificate held by the First National Bank at Rome was decreed to be impressed with the trust in favor of the plaintiff and the same adjudged to belong to the complainant and enjoining the Bank of Jasper from paying any part of these

proceedings to the First National Bank of Rome and that the certificates of deposit in so far as it included the proceeds derived from the note of the plaintiff was void. The Bank of Jasper insisted that this decree was *res adjudicata* as to its alleged liability to the First National Bank on the certificates of deposit, because they were judgments *in personam* against that bank and because certificates of deposit represented the proceeds of notes discounted.

The court in discussing this said:

> "It is clear that in Florida an appearance entered in the trial court specially for the purpose of quashing the service does not operate as a general appearance; but that if after such motion is made and overruled, the case proceeds to final decree, a defendant who prosecutes an appeal therefrom will be held to appear generally."

This Court points out that there was an appeal from an interlocutory order provided by the general statutes of Florida and that there was nothing to indicate that the right did not extend to orders concerning jurisdiction. It then says:

> "It certainly may not be assumed that the legislature intended that the exercise of the right conferred should operate as a general appearance and thus render moot a consideration of the ruling alone sought to be reviewed."

If a special appearance would authorize the rendition of a judgment in personam, certainly the summons as made was not sufficient to confer jurisdiction,

the only question submitted was the question of jurisdiction, this case stood so far as legal effect was concerned as if it had never been appealed to the Supreme Court of Florida. The lower state court had already overruled the motion to quash the service and the Supreme Court said it was right in so doing. We can see, under the circumstances, and because of the stipulation, the mere appeal did not confer jurisdiction.

So, the question comes back as to whether or not the effect of the special appearance was to permit the Florida state court upon the overruling of the motion to quash service, to proceed to render a judgment in personam. Applying the reasoning of this case to the case at bar, this Court must hold, it seems, that the action of the federal court in Missouri in rendering judgment against us, was the same as in the Jasper Bank case and that the same rules would apply and that upon appearance limited solely to the question of jurisdiction, the person in making the objection does not submit himself to the jurisdiction of the court even upon the overruling of the objection.

In Chicago Life Insurance Co. *vs.* Cherry, 244 U. S. 25, 61 L. E. 966. A judgment was recovered in a Tennessee court after the question of jurisdiction had been raised in the trial court and decided against defendant and the judgment was affirmed by two higher courts in Tennessee to which it was appealed. The plaintiff then brought a suit in Illinois against the defendant upon the Tennessee judgment. The defendant in that case claimed that the judgment sued on was void. The plaintiff recovered a judgment in Illi-

nois which was affirmed by the appellate court and a writ of certiorari was denied by the Illinois Supreme Court. The defendant then appealed to the Supreme Court of the United States claiming that the judgment of the Illinois court deprived it of its property without due process of law. The Supreme Court affirmed the judgment, holding that the Court in *Illinois* having determined that the *Tennessee* court had jurisdiction, the defendant was not deprived of his property without due process of law. *It did not hold that the decision of the Tennessee court precluded inquiry by the Illinois court as to the jurisdiction of the Tennessee court.* In fact the opinion indicates the jurisdiction of the Tennessee court could be inquired into by the Illinois court notwithstanding the Tennessee court had passed on the same question and that the decision of the Illinois court was final whether right or wrong. In the opinion of the Court by Judge Holmes he says:

> "The ground upon which the present judgment was sustained by the appellate court was that as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction. A court that renders judgment against a defendant thereby tacitly asserts, *if it does not do so expressly*, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its *mere assertion of its own power*. (Thompson *v.* Whitman, 18 Wall. 457,

21 L. ed. 897.) *Even where its power depends upon a fact and it finds the fact.* (Tilt v. Kelsey, 207 U. S. 43, 51, 52 L. Ed. 95, 99, 28 Supt. Ct. Rep. 1.) A divorce might be held void for want of jurisdiction although the libelee had appeared in the cause. Andrews *v.* Andrews, 188 U. S. 14, 16, 17, 38, 47 L. Ed. 366, 367, 372, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judgment, the jurisdiction of the court rendering it over the person of the defendant may be inquired into. National Exch. Bank *vs.* Wiley, 195 U. S. 237, 49 L. Ed. 184, 25 Supt. Ct. Rep. 70; Haddock *v.* Haddock, 201 U. S. 562, 573, 51 L. Ed. 867, 871, 26 Sup. Ct. Rep. 525. 5 Ann. Cas. 1. But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York *v.* Texas, 137 U. S. 15, 34 L. ed. 704, 11 Sup. Ct. Rep. 9; Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261, 272, 283, 59 L. ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth *v.* Hammond, 166 U. S. 506, 517, 41 L. ed. 1096, 1099, 17 Sup. Ct. Rep. 665. It can be no other-

wise when a *court so decides as to proceedings* in another state. It may be mistaken upon what too *it is matter of fact, the law of the other state*. But a mere mistake of that kind is not a denial of due process of law."

It appears clearly from the foregoing quotation that the court did not consider that the court of one state could preclude inquiry by another court of its jurisdiction over the defendant even though that precise question was raised in the first case, unless it be a question as to whether under the local practice in the first state the defendant has submitted to the jurisdiction of that court. This distinction is clearly drawn. The court by way of illustration says that if a statute or the decision of a state should provide that the filing of a plea in abatement or an appeal constituted a submission to the jurisdiction of the court, then no right under the Constitution would be infringed by enforcing such a judgment. Furthermore, that the same rule applied when the court of one state so decides as to proceeding in another state, because the law of another state is a question of fact.

In Foster Milburn Co. *vs.* Chinn, 202 Fed. 175 (2d), a suit was brought in the State court of Kentucky against a foreign corporation. Summons was served upon an individual as managing agent. The defendant appears specially to quash the return of service on the ground that it had no office, officer or managing agent in the state and that service made would not bind it. The motion was overruled and the defendant still protesting the jurisdiction answered and took part

in the trial which resulted in a verdict against it. The defendants appealed to the Court of Appeals on the jurisdictional question alone, where it was affirmed on the ground that the defendant by appealing had waived its objection to the jurisdiction. Plaintiff then brought suit in Federal Court of New York, on the Kentucky judgment. The defendant answered alleging the foregoing facts and that the court had no jurisdiction. Judgment for plaintiff was affirmed by the Circuit Court of Appeals.

In the opinion it is said:

> "It is certainly the general rule of the Federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness *v.* Hyde, 96 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky that though the defendant appears specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he *ipso facto* waives his objection and transforms his special into a general appearance."

It will be observed from the foregoing quotation that recognition was given to the Kentucky judgment *because of the law or usage in Kentucky that defendant's appeal constituted a general appearance.* For that reason the Court says:

> "It is not necessary for us to determine whether the service of process upon Monroe as managing agent was good or bad."

It is quite apparent from the language used by the court that it would have been proper for it to determine whether there was valid service in the absence of the rule in Kentucky that the appeal constituted a general appearance. There is no intimation or indication that otherwise the defendant would in any way be estopped from questioning the service of process of the Kentucky court.

Again on page 177 of the opinion it is said:

> "The defendant, after its motion to quash the service of process was denied, might have treated it as bad and not defended the action at all; but, having done so, it cannot be said to be deprived of its property without due process of law because held fixed by the usage of the state of Kentucky. York *v.* Texas, 137 U. S. 15, 11 Sup. Ct. 9; 23 L. Ed. 604."

Again it will be observed the court holds the defendant cannot question the validity of the service in Kentucky because of the peculiar Kentucky law.

In Southern Pac. Co. *vs.* Denton, 146 U. S. 202, 36 L. Ed. 942, the Supreme Court refused to recognize the Texas statute mentioned in York *vs.* Texas, *supra*, as applying to a case in Federal Court in Texas. It held the question of jurisdiction was for the determination of the Federal court, regardless of the statutory provisions and that service on a foreign corporation was not valid unless it was doing business in that State.

See also Mex. R. R. *vs.* Pinkney, 149 U. S. 194; 37 L. Ed. 199.

Forsyth *vs.* Hammond, 166 U. S. 506; 41 Law Ed. 1095, is another one of the cases which points out the difference between the party making a special appearance, then after judgment against himself, appealing or applying to a higher court to relitigate the question.

Paragraph No. 5 of the syllabus stated:

> "That one who has voluntarily sought the judgment of the Supreme Court of the state to declare that the decree of the lower court was not only erroneous, but void, although not a voluntary litigant in the trial court, is bound by decision of the Supreme Court as *res adjudicata* and cannot attack it collaterally in the Circuit Court of the United States."

This holding is not that the lower court's judgments may not be attacked collaterally, but that the party affected by it, having taken and invited the decision of another court having judisdiction upon it, will be bound.

11. Under the Federal practice, an appearance to object to the jurisdiction of the court, does not bind the parties appearing to submit to the jurisdiction of the court then overruling the objection.

Hughes Federal Practice, Vol. 6, page 356, Sec. 3817.

Hitchman Coal & Coke Co. *vs.* Mitchell, 245 U. S. 229; 62 Law Edition 260.

Bear in mind that the evidence in this case in the trial in the Iowa Federal court was undisputed as will be seen

on pages 3 and 4 of our original brief. Such state of facts under all the decisions establish that the defendant was not subject to service in the State of Missouri.

In the trial of the case appealed, before the Iowa Federal Court, the sole claim of the plaintiff was that as the Federal Court in Missouri had found against defendant on its motion to quash, the matter became *res adjudicata* on the question of jurisdiction of the Missouri Federal Court and hence the defendant in such a suit on that judgment is estopped of record to challenge the validity of the service.

In other words, the sole contention of the plaintiff was, and has been, through all the entire progress of this case, that even though the defendant was not subject to service in Missouri and not subject to suit there, if defendant in any way questioned the service and the decision was against it, the matter became final and could not be questioned in any other court.

These are the questions in this case. We think that the writ of certiorari should be denied because the undisputed evidence in the trial of the case that the writ was taken from was to establish that the defendant was not subject to suit in the Missouri Federal Court.

Respectfully submitted,

J. M. PARSONS,
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E. C. MILLS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 445.—October Term, 1930.

Floy P. Baldwin, Petitioner, *vs.* Iowa State Traveling Men's Association, a corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 18, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

A writ of certiorari was granted herein[1] to review the affirmance by the Circuit Court of Appeals[2] of a judgment for respondent rendered by the District Court for Southern Iowa. The action was upon the record of a judgment rendered in favor of the petitioner against the respondent in the United States District Court for Western Missouri.

The defense was lack of jurisdiction of the person of the respondent in the court which entered the judgment. After hearing, in which a jury was waived, this defense was sustained and the action dismissed. The first suit was begun in a Missouri state court and removed to the District Court. Respondent appeared specially and moved to quash and dismiss for want of service. The court quashed the service, but refused to dismiss. An alias summons was issued and returned served, whereupon it again appeared specially, moved to set aside the service, quash the return, and dismiss the case for want of jurisdiction of its person. After a hearing on affidavits and briefs, the motion was overruled, with leave to plead within thirty days. No plea having been filed within that period the cause proceeded and judgment was entered for the amount claimed. Respondent did not move to set aside the judgment nor sue out a writ of error.

The ground of the motion made in the first suit is the same as that relied on as a defense to this one, namely, that the respondent

[1] 282 U. S. —.
[2] 40 F. (2d) 357.

is an Iowa corporation, that it never was present in Missouri, and that the person served with process in the latter state was not such an agent that service on him constituted a service on the corporation. The petitioner objected to proof of these matters asserting that the defense constituted a collateral attack and a retrial of an issue settled in the first suit. The overruling of this objection and the resulting judgment for respondent are assigned as error.

The petitioner suggests that Article IV, Section 1 of the Constitution forbade the retrial of the question determined on respondent's motion in the Missouri District Court; but the full faith and credit required by that clause is not involved, since neither of the courts concerned was a state court. (Compare *Cooper* v. *Newell*, 173 U. S. 555, 567; *Supreme Lodge Knights of Pythias* v. *Meyer*, 265 U. S. 30, 33). The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri District Court, would be to deny the due process guaranteed by the Fourteenth Amendment; but there is involved in that doctrine no right to litigate the same question twice (*Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25; compare *York* v. *Texas*, 137 U. S. 15).

The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. *Harkness* v. *Hyde*, 98 U. S. 476; *Goldey* v. *Morning News*, 156 U. S. 518; *Toledo Rys. & Lt. Co.* v. *Hill*, 244 U. S. 49; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405. The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have

raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. *Thompson* v. *Whitman*, 85 U. S. 457; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hart* v. *Sansom*, 110 U. S. 151; *Wetmore* v. *Karrick*, 205 U. S. 141; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111; *McDonald* v. *Mabee*, 243 U. S. 90. It had also the right to appeal from the decision of the Missouri District Court, as is shown by *Harkness* v. *Hyde*, *supra* and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

While this Court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. *Phelps* v. *Association*, 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; *Moch* v. *Insurance Co.*, 10 Fed. 696; *Thomas* v. *Virden*, 160 Fed. 418; *Chinn* v. *Foster-Milburn Co.*, 195 Fed. 158. And we are in accord with this view.

Respondent relies upon *National Exchange Bank* v. *Wiley*, 195 U. S. 257, but it is not in point; for there it was shown, not that the defendant in the judgment of the Ohio state court on which suit was brought had appeared and contested jurisdiction, but that an attorney without right or authority had assumed to appear and confess judgment on its behalf.

Bank of Jasper v. *First National Bank*, 258 U. S. 112, cited by respondent, involved a wholly different question from that here presented. There a suit in equity was brought in a state court against both resident and non-resident defendants. Pursuant to state law constructive service upon the non-residents was made by publication. One of them, a Georgia bank, appeared specially and moved to quash the service. Its motion was overruled, and on appeal the supreme court of the state affirmed, holding that the pur-

pose of the statute authorizing constructive service by publication was merely to notify non-residents of the pending suit so that they might, if they cared to do so, come into the case. It held that there was no right to quash the notice, but that the non-resident had its full right to object should the court thereafter commit an error against it. This Court held that the special appearance for the purpose of quashing the notice of service did not amount to a general appearance. Subsequent proceedings in the state court, therefore, were taken without the presence of the bank and were not binding upon it unless the *res* to be affected was in Florida and subject to the control of the state court. That point was not litigated by the bank—it was not present. This Court held there was not such *res* subject to the power of the state court, and therefore its judgment was not binding upon those who were not actual parties.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END OF CASE